Supreme Court, U.S.
FILED
AUG 7 1980
MICHAEL RODAK, JR., CLERK

CASE NO. 80-200

in the

Supreme Court of the United States

October Term, 1979

CHASE MORSEY, JR.,

Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

August 7, 1980

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER FACT QUESTIONS NECESSARY TO DETERMINE THE EXISTENCE OF A SECURITY ARE FOR THE JURY

II.

WHERE THE PROMOTER PROMISED TO MANAGE INCOME STREAMS AND TO USE HIS EXPERTISE, REPUTATION, AND MARKET POSITION TO SELL THE LAND AT A PROFIT, WHETHER A PARTICIPATION IN A LAND SYNDICATION IS A SECURITY

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JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed without opinion on April 11, 1980, and denied rehearing on May 9, 1980.

Jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

REPORTS OF OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed without opinion. *Morsey v. Green*, 615 F.2d 917 (5th Cir. 1980). The opinion of the United States District Court, Southern District of Florida, is unreported.

STATUTES INVOLVED

The Securities Act of 1933 §2(1), 15 U.S.C. §77b(1) (1976):

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The Securities Act of 1933 §5(a), 15 U.S.C. §77e(a) (1976):

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly —
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any

means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

The Securities Act of 1933 §12, 15 U.S.C. §77*l* (1976):

Civil liabilities arising in connection with prospectuses and communications
Any person who —

(1) offers or sells a security in violation of section 5, or

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the

consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

The Securities Act of 1933 §17(a), 15 U.S.C. §77q(a) (1976):

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The Securities Exchange Act of 1934 §3(a)(10), 15 U.S.C. §78c(a)(10) (1976):

> The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

The Securities Act of 1933 §15, 15 U.S.C. §770 (1976):

> *Liability of controlling persons*
> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under

section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

The Securities Exchange Act of 1934 §10, 15 U.S.C. §78j (1976):

Manipulative and deceptive devices
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as

the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

United States Constitution Amend. VII:

Trial by jury in civil cases.
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Chase Morsey, Jr. ("Morsey"), sued Respondents, Elmer G. Green ("Green") and First National Bank in Palm Beach (the "Bank"), for the sale of unregistered securities and for deceptive acts and practices in violation of federal securities law.

Green and the Bank moved to dismiss for lack of subject matter jurisdiction. The district court, without receiving evidence, granted the motion, holding that, on the face of the complaint, Morsey's investment was not a security.

Then the district court granted Morsey's motion for rehearing. However, in spite of Morsey's timely jury demand, the district judge received evidence (purportedly under Fed.R.Civ.P. 42), entered findings of fact and conclusions of law, and adhered to the earlier dismissal.[1]

The Fifth Circuit affirmed without opinion.[2]

Statement of the Facts

The suit arose from Morsey's purchase of a 20% participation in a real estate syndicate.[3]

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[1]App. pp. 28-32. The case proceeded to trial on Morsey's pendent state claims.

[2]App. p. 33.

[3]App. p. 29 ¶9.

Morsey disputes much of the district court's fact findings, as well as the court's right to make them.

However, the district court correctly found that Green proposed the purchase of a 16,000 acre operating ranch, in undivided shares, through a land title trust managed by the Bank. with a plan for a quick profitable resale.[4] And, the court correctly found, Green represented that income streams on the ranch would partially offset mortgage payments,[5] making it feasible for the syndicate to hold the ranch through the requisite capital gains tax period.

Green chose the property, purchased it through a shell corporation, and structured the syndicate.[6] He boasted of his expertise, reputation, and market position as a speculator. He told Morsey that the property could be developed, and could be sold to a developer at a handsome profit.

Green told Morsey he would (and he did) take exclusive control of the investment. The written land title trust agreement (which Morsey did not even see until after he parted with his money) purported to give Morsey *pro rata* authority to control the syndicate. The district court, relying on that instrument, incorrectly found Morsey himself had substantial control.

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[4]App. p. 29.

[5]App. p. 29 ¶3.

[6]App. p. 29 ¶6.

The district court further found that Morsey's expectation of profit was based on an anticipated rise in value on resale[7] — i.e., capital appreciation rather than operating income. But the income streams were in fact a material part of the investment, and Green promised to manage those income streams, to offset a portion of the mortgage expense. And, in fact, the expectation of a profitable resale was based solely on Green's unique expertise, reputation, and market position. The expectation was, therefore, not based on a rising market. It was based on Green.

[7]App. p. 29 ¶4.

REASONS FOR ALLOWANCE OF THE WRIT

The issues presented go to the heart not only of the fundamental right to a jury trial, but also of the scope of federal securities laws.

Morsey submits that the questions presented should plainly be answered affirmatively. And because of the fundamental importance of these issues and the absence in the case law of express, definitive answers, this Court should grant the writ of certiorari.

I.

WHETHER FACT QUESTIONS NECESSARY TO DETERMINE THE EXISTENCE OF A SECURITY ARE FOR THE JURY

In making the crucial (and disputed) factual determinations necessary to determine whether Morsey's syndicate participation was an "investment contract," the trial judge improperly preempted the jury.[8]

In *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), this Court indicated that factual questions necessary to determine the existence of a security are for the jury. The Court stated that the existence of a security could be proven either by the document itself, or by extraneous circumstances. And, the Court clearly

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[8]The legal determination was necessarily and expressly based on the factual determinations (1) that Morsey shared control of the enterprise and (2) that the expectation of profit was based on market appreciation rather than on Green's entrepreneurial efforts. There was ample evidence for a jury to find otherwise.

indicated the obvious: extraneous circumstances present factual questions (which necessarily are for the jury):

> In some cases it might be done by proving the document itself, which on its face would be a note, a bond, or a share of stock. In others proof must go outside the instrument itself as we do here. Where this proof is offered in a civil action, as here, a preponderance of the evidence will establish the case; if it were offered in a criminal case, it would have to meet the stricter requirement of satisfying the jury beyond reasonable doubt.

320 U.S. at 355.

In *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961), the court held that factual questions necessary for determining the existence of a security were properly for the jury. The district court had instructed the jury that the particular mineral leases were securities. Citing the language quoted above from *Joiner* and the emphasis in *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946), on substance and economic realities, the court reversed:

> By its very nature, it is the peculiar facts of the setting which turns the offer from a mere sale of property into a sale of a security. That means that the trier of fact, here a jury, must determine the issue.

In *Tarvestad v. United States,* 418 F.2d 1043, 1048 (8th Cir. 1969), *cert. denied,* 397 U.S. 935 (1970), the

court affirmed a jury instruction reciting the statutory language to determine the existence of a security:

> Under the circumstances surrounding their sale, we have no difficulty in approving the submission of the question to the jury.

Great Western Bank and Trust v. Kotz, 532 F.2d 1252 (9th Cir. 1976) followed *Joiner* and *Tarvestad.* The district court, on a finding that the promissory note in question was not a security, dismissed the case for lack of subject matter jurisdiction. The court of appeals stated that the dismissal was erroneous, and, noting that the district court had considered evidentiary material, reviewed the dismissal as a defense summary judgment. The court affirmed only by concluding that there was no genuine issue of *fact:*

> Viewing all the evidence in a light most favorable to GWB, we conclude that the promissory note given by Artco bears no economic resemblance to the "securities" defined by the 1933 and 1934 acts.

532 F.2d at 1260.

The court recognized that while "the issue raised is ultimately one of law," 532 F.2d at 1255, unless the standards for summary judgment or directed verdict are met, the factual questions necessary to make that legal determination are for the jury.

In *United States v. Carman,* 577 F.2d 556, 563 (9th Cir. 1978), the court (while reversing on other grounds)

approved a jury verdict finding an investment contract, where the jury instruction was based on the statutory language and on *Howey:*

> Finding that the court's statement of the applicable law was correct and complete, our review becomes limited to the sufficiency of the evidence to support the jury's verdict.

In *Goodman v. Epstein,* 582 F.2d 388 (7th Cir. 1978), the court reversed the trial judge's denial of a directed verdict finding a security. However, the court implicitly recognized that the factual questions can be taken from the jury only on the standards for summary judgment or directed verdict. Noting that the existence of an investment contract "must be determined from the actual facts and circumstances," 582 F.2d at 406, the court held:

> We do not accept defendant's assertion that they raised sufficient factual questions to necessitate the trial judge's sending this issue to the jury. A summary perusal of the evidence adduced at trial reveals no debatable question of the plaintiff's interests meeting all three of the Howey/Forman tests.

582 F.2d at 407.

These decisions all indicate an affirmative answer to the question presented here — i.e., that the factual questions necessary to determine the existence of a security are for the jury. However, in *Ahrens v. American-Canadian Beaver Co.,* 428 F.2d 926, 928 (10th Cir. 1970), the court suggested a contrary rule:

> The nature of the contracts here concerned and the application of the securities acts as the issue here arose before the trial court was a question of law and not of fact. Since the question whether the beaver contracts were "investment contracts" within the acts were submitted to the jury by the trial court, we must reverse.

Morsey submits that the result is clear: the factual questions necessary to determine the existence of a security are for the jury. However, the result in this case itself demonstrates that the case law permits some ambiguity. The district judge here took it upon himself to make factual determinations, in clear derogation of Morsey's fundamental right to a jury trial. *See Beacon Theatres v. Westover,* 359 U.S. 500, 501 (1959):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

This Court should grant the petition, to clarify the application of *Howey* and its progeny, and to insure the fundamental right to a jury trial.

II.

WHERE THE PROMOTER PROMISED TO MANAGE INCOME STREAMS AND TO USE HIS EXPERTISE, REPUTATION, AND MARKET POSITION TO SELL THE LAND AT A PROFIT, WHETHER A PARTICIPATION IN A LAND SYNDICATION IS A SECURITY

Even apart from the fundamental jury issue, this Court should grant the petition to determine the applicability of the securities laws to land syndications.

Morsey purchased a 20% participation in a syndicate Green formed to purchase, operate, and resell a 16,000 acre operating ranch.

Morsey plainly invested in a common enterprise with the expectation of profits solely from the efforts of others. The district court's contrary conclusion misconstrued the nature of profits and efforts cognizable under *Howey* and its progeny.[9]

The district court in finding no security relied heavily on the fact that the expected profit was principally from a resale of the property.[10] However, in *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 852, this Court stated that "profit" means either

[9]See generally *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975); *Tcherepnin v. Knight,* 389 U.S. 332 (1967); *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946); *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344 (1943).

[10]App. p. 29 ¶4.

"capital appreciation" or income. *See also Cameron v. Outdoor Resorts of America, Inc.*, 608 F.2d 187, *modified on other grounds*, 611 F.2d 105 (5th Cir. 1979):

> It is irrelevant that their investment purpose might have been profit from appreciation rather than from rent. 'By profits, the court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of the investors' funds . . . .'

But see Happy Investment Group v. Lake World Properties, Inc., 396 F.Supp. 175, 180 (N.D. Cal. 1975) (emphasizing that "at no time *until sale* of the land will plaintiffs realize any actual monetary profit").

The district court's limiting "profits" to income is unwarranted and is contrary to *Forman*.

The district court also relied on the fact that Green did not propose physically to develop the property.[11] Green's promised efforts were to manage the income streams (partially to offset mortgage payments), structure the syndicate, and find a buyer, using his reputation, market position, and expertise. The district court held that these efforts are not cognizable under the securities laws, relying on *Van Arsdale v. Claxton*, 391 F.Supp. 538, 541 (S.D. Cal. 1979):[12]

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[11]App. p. 29 ¶6.

[12]Quoting Loss, Securities Regulation, 491-492 (2d ed. 1961).

> For example, no investment contract is involved when a person invests in real estate, with the hope perhaps of earning a profit as a result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others.

But see Altshuler v. Cohen, 471 F.Supp. 1372, 1380 (S.D. Tex. 1979)[13] and *Bartels v. Algonquin Properties Ltd.,* 471 F.Supp. 1132 (D. Vt. 1979) (holding interests in speculative real estate ventures to be securities, notwithstanding the absence of any physical development).

The district court's limiting cognizable efforts in real estate syndications to physical development is unwarranted. Morsey did not invest in a piece of real estate. He invested in Green. Green structured this deal and told Morsey that he would manage the income and find a quick buyer — not because of any inherent value in the property, but because, as he boasted to Morsey,

[13]"Although the plaintiffs were primarily dependent for success upon economic trends, it is also true that they were primarily passive, and were to some degree dependent upon management skills of the syndicators. Investors in any enterprise, are, to varying degrees, subject to economic trends and the success of their investment is dependent upon, in part, economic trends. It was not contemplated that plaintiffs themselves would actively participate in the management of the affairs of the venture. Plaintiffs invested for the purpose of creating profits through the efforts of the defendant in conjunction with what was hoped to be favorable economic trends. Defendant's skill in marketing the property was a material factor in the success of the enterprise."

he was "Florida's Master Real Estate Sleuth." The fact that Green was master-minding a speculative venture rather than building houses in no way diminishes the crucial importance of his efforts.

Applicability of the securities laws plainly does not depend on "the nature of the assets back of a particular document or offering." *Joiner,* 320 U.S. at 352.[14] A

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[14]Real estate cases commonly turn on issues of control or an investment/consumption dichotomy. See generally, *SEC v. W.J. Howey Co.,* 328 U.S. 293 (1946) (sales of orange grove tracts held securities); *Cameron v. Outdoor Resorts of America, Inc.,* 608 F.2d 187, modified on other grounds, 611 F.2d 105 (5th Cir. 1979) (condominium campsite sales held securities); *McCown v. Heidler,* 527 F.2d 204 (10th Cir. 1975) (dismissal of complaint by purchasers of undeveloped lots in real estate development project reversed where purchase depended on promised improvements and purchase price was used for improvements); *Altshuler v. Cohen,* 471 F.Supp. 1372, 1380 (S.D. Tex. 1979) (real estate joint venture, formed for speculation and not for development of tract, held a security); *Bartels v. Algonquin Properties, Ltd.,* 471 F.Supp. 1132 (D. Vt. 1979) (limited partnership interest in speculative real estate venture held a security); *Timmreck v. Munn,* 433 F.Supp. 396, 402-404 (N.D. Ill. 1977) (motion to dismiss security claim denied where plaintiffs purchased lots with expectation of profitable resale based on developers' efforts); *Kroungold v. Treister,* 407 F.Supp. 414 (E.D. Pa. 1975) (limited partnership interest in apartment development held a security); *Sandusky Land, Ltd. v. Uniplan Groups, Inc.,* 400 F.Supp. 440 (N.D. Ohio 1975) (limited partnership in housing development as a security); *Ferland v. Orange Groves of Florida, Inc.,* 377 F.Supp 690 (M.D. Fla. 1974) (orange grove tracts held securities); *SEC v. Lake Mavasu Estates,* 340 F.Supp. 1318 (D. Minn 1972) (purchase of land purchase contracts held a security). But see *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975) (housing cooperative sales held not securities, where primary inducement was consumption, not investment); *Woodward v. Terracor,* 574 F.2d 1023 (10th Cir. 1978)

volatile market and profits deferred until sale are factors normally present in any real estate venture. To hold, as the district court did, that either factor vitiates the significance of profits based on the efforts of others defeats *Howey* and ignores the economic realities of real estate speculation.

This Court should grant the petition, to resolve the meaning of "profits" and "efforts" and to clarify the applicability of the securities laws to real estate investments.

Footnote 14 (Continued)

(lot purchases in residential development held not securities, where prospective improvements were not part of a common enterprise); *Commander's Palace Park Assoc. v. Girard & Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978) (mobile home sale-leaseback held not a security where purchasers retained management control); *Schultz v. Dain Corp.*, 568 F.2d 612 (8th Cir. 1978) (apartment complex investment held not a security where purchaser retained management control); *Owners of "SW 8" Real Estate v. McQuaid*, 513 F.2d 558 (9th Cir. 1975) (shopping center investment held not a security where purchaser retained control of his portion); *Johnson v. Nationwide Industries, Inc.*, 450 F.Supp. 948 (N.D. Ill. 1978) (condominium sales held not securities); *Happy Investment Group v. Lake World Properties, Inc.*, 396 F.Supp. 1975 (N.D. Cal. 1975) (capital appreciation held insufficient to establish expectation of "profit"); *Oxford Finance Co. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974) (real estate joint venture held not a security where investors retained management authority).

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. WPB-76-8044-Civ-CA

SECOND AMENDED COMPLAINT FOR RESCISSION UNDER THE SECURITIES LAWS OF FLORIDA AND OF NEW YORK FOUNDED UPON DIVERSITY OF CITIZENSHIP AND FOR RESCISSION UNDER THE FEDERAL SECURITIES LAWS, FOR DAMAGES FOR FRAUD, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, BREACH OF TRUST, LEGAL MALPRACTICE, AND FOR OTHER RELIEF

Plaintiff, Chase Morsey, Jr., sues Elmer G. Green, individually; First National Bank in Palm Beach, a National banking association, individually and as Trustee ("First National"); Gustave T. Broberg, Jr., individually; Phillip H. Reid, individually; Coe, Broberg & Reid, a Florida law partnership; and Legal Negligence Insurer, a foreign insurance company, jointly and severally, and alleges:

JURISDICTION

1. This is an action for rescission under Federal, New York and Florida securities laws, alternatively or cumulatively for damages under such laws or under common law fraud, breach of contract, and breach of trust.

2. Jurisdiction is found on diversity of citizenship and jurisdictional amount, under Title 28 United States Code §1332, as well as on the existence of a question arising under particular Federal statutes [Title 15 United States Code §77a *et seq.*) (the "1933 Act"), the Securities Exchange Act of 1934, as amended (Title 15 United States Code §78a *et seq.*) (the "1934 Act"), the rules and regulations promulgated under the 1933 Act and the 1934 Act (the "Regulations"), the Investment Advisors Act of 1940, as amended (Title 15 United States Code §806 *et seq.*) (the "1940 Act")].

3. As to diversity of citizenship:

(a) Plaintiff, Chase Morsey, Jr., is a citizen of the State of Connecticut, residing in Greenwich, Connecticut.

(b) Defendant Elmer G. ("Ed") Green is a citizen and resident of the State of Florida.

(c) Defendant First National is a national banking association having its principal and only place of business in Palm Beach County, Florida, and is a citizen of the State of Florida.

(d) Defendant Gustave T. Broberg, Jr., is a citizen and resident of the State of Florida.

(e) Defendant Phillip H. Reid is a citizen and resident of the State of Florida.

(f) Defendant Coe, Broberg & Reid is a Florida law partnership with its place of business in Palm Beach

County, Florida, and all of whose partners are citizens and residents of Palm Beach County, Florida.

(g) Legal Negligence Insurer is a foreign insurance company, with its principal place of business not in Florida or in Connecticut.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00) by Morsey as against each Defendant.

5. This Court has *diversity jurisdiction* under Title 28 United States Code §1332.

6. This Court has jurisdiction over the Federal claims stated herein under Section 22 of the 1933 Act and Section 27 of the 1934 Act (Title 15 United States Code §§77v(a) and 78aa), and over the state claims as diversity claims, as well as under the doctrine of pendent jurisdiction.

FACTUAL BACKGROUND

7. Green represented himself to Morsey and other investors in the Magnolia Ranch as an expert Florida real estate syndicator and manager, having successfully syndicated and managed nearly thirty Florida real estate promotions.

8. On May 18, 1973, Green, while in Florida, telephoned Morsey in New York City and offered Morsey the opportunity to purchase a security interest in a Florida real estate syndication known as the Magnolia Ranch, which Green stated he was organizing and promoting, would operate, manage and resell.

9. Green represented to Morsey that the Magnolia Ranch was located near Orlando, Florida, and contained about 16,000 acres, had a hay-drying operation, was engaged in cattle ranching, the operation of citrus groves, the operation of hunting concessions, and carried on farming and other enterprises primarily under the Terry family. The ranch, said Green, was available for sale at a sacrifice price due to the illness of Mr. Terry, Sr. Among other things, Green represented to Morsey that:

(a) Green had made substantial profits for himself and many other investors in the Central Florida area; he knew the value of the Magnolia Ranch and that it was far in excess of the $755 per acre he was buying it for; that, indeed, the Ranch property was worth some $1100 per acre; and that Green had two prospective investors already interested in the Ranch;

(b) the Magnolia Ranch had been offered many times previously to Green at about $1100 per acre;

(c) the Magnolia Ranch was *an operating property;*

(i) it was a successful farming and ranching operation with sales of sod, cattle grazing and pasturage under a commercial cattle lease, producing citrus groves, and income from hunting leases and concessions;

(ii) the foregoing activities, tended by a number of permanent employees, was producing a net income of some $200,000 a year; this income and other potential and increased income from the operation (grove income to increase 20% per year) would substantially and significantly reduce Morsey's (and the other investors') costs of carrying the investment;

(iii) the commercial cattle grazing lease on the Ranch utilized some 6700 acres of improved pasture as well as some 6000 to 7000 acres of unimproved pasture — 80 to 85% of the Ranch acreage — meant that more than 90% of the Ranch was put to commercial, operational use;

(d) Green had "a plan" to manage the investment for not more than a year and then to sell it for $1150 per acre; Green wrote of his intentions concerning the Ranch: "my plan is to sell in less than one year for about $1,150 per acre." He repeated this in writing on a map.

(e) Green controlled so much land in Central Florida through a multitude of other syndications that Green could effectively make his own market price. To "substantiate" this claim, Green sent to Morsey a copy of an article about Green contained in "The Floridian" Sunday supplement to the *St. Petersburg* (Florida) *Times* for May 13, 1973, a copy of which is annexed and made part of this Second Amended Complaint as Exhibit "A".

10. Green represented to Morsey that he, Green, was forming a syndicate to purchase the Magnolia Ranch, that *he would manage* the Magnolia Ranch for Morsey and other investors, that the profits resulting from Green's management of the Magnolia Ranch would help defray some $200,000 of the yearly carrying costs.

11. Green further represented that the Orlando area, where the Magnolia Ranch was located, was a growing area, that he, Green, was particularly well-acquainted and expert in this area, that as a result of his expertise in operating, managing, and buying and selling such operating properties and his extraordinary reputation and following of investors, that he, Green, had purchasers already available for the Ranch. His most substantial problem, said Green, was to be able to keep from reselling the property before his investors could satisfy the six months' holding period requisite for capital gains treatment.

12. Green further represented that he had successfully managed many other similar syndicates for other investors, was indeed doing so at the present time, that all he required or allowed Morsey, as well as the

other investors, to do was to put up their money, which Green promised, due to the leverage of the investment, to multiply within a year.

13. Green represented to Morsey that he, Green, would take care of full managerial responsibilities for the operation of the Magnolia Ranch, and that the investors should "not bother him" about its management and operation.

14. Green told Morsey that he had other prominent investors to invest in the Magnolia Ranch with Morsey.

15. Green told Morsey that the format he had used in his other real estate syndicates was that of a trust which would hold title to the property, the trustee being First National, and that he, Green, would manage the property for the benefit of all the investors, the investors to receive a security interest in the trust called a "Participation."

16. By letter mailed from Florida, delivered to Morsey at Morsey's office in New York City on May 19, 1973, Green repeated his offer; the letter is annexed and made part of this Second Amended Complaint as Exhibit "B".

17. Green continued to repeat his offer of the Participation in numerous telephone conversations with Morsey during the period May 19, 1973, through the early part of June, 1973.

18. Green represented that Magnolia Ranch could be developed — with golf courses, homes, ranchettes, condominiums and apartments, and that Magnolia Ranch was zoned for such development.

19. The investment syndicate proposed by Green amounted to a common enterprise in which several investors invested their money, the management and hopeful expectation of profits being made for them by Green, who promised effectively to manage and resell the property for Morsey and the other investors.

20. On June 8, 1973, Morsey accepted Green's offer and decided to invest in the Participation offered by Green by depositing in the mail in New York City Morsey's check to Green's order in the amount of $250,000, addressed to Green in Florida. The check was delivered by the U.S. Postal Service, accepted by Green and First National.

21. In connection with the sale of the Participation to Morsey, Green told Morsey that Morsey could and should use Broberg as Morsey's attorney to represent Morsey in connection with the trust to be set up and the acquisition of the Magnolia Ranch. In a meeting set up by Green, Broberg told Morsey that he would, on Morsey's behalf, prepare the documents, that Morsey need not worry about them, that everything would be appropriately and properly documented.

22. Morsey relied upon Broberg's representation that everything was in proper form and that Morsey need not worry about the legal technicalities, since Broberg had taken care of that, and Morsey, relying

upon "his attorney's" advices and assurances, did not, until much later, review any of the documents furnished him.

23. Unknown to Morsey and despite the fact that Broberg had accepted money from Morsey to act as Morsey's attorney, Broberg was operating under a conflict of interest, in that he was actually acting by and for Green (as he had on many other previous occasions in the formation of real estate syndications).

24. The documents which Broberg furnished Morsey contained many provisions which were not to Morsey's best interest, such as a putative forfeiture clause and other provisions which Broberg never explained to Morsey.

25. The Participation was not registered for sale under the Securities Act of 1933, the Florida Blue Sky Laws or the New York Blue Sky Laws.

26. The offer for sale of the Participation was in violation of the 1933 Act, the Florida Blue Sky Laws and the New York Blue Sky Laws.

27. During the course of the communications referred to in the preceding paragraphs, Green failed to disclose numerous facts. The facts not disclosed by Green included, *inter alia,* (a) the size and schedule of the mortgage payments with respect to the real estate; (b) the fact that Morsey would be required to advance substantial funds to the Trust to enable the Trust to meet periodic and recurring mortgage payments and expenses; (c) that there was a provision in the Trust

Agreement whereby, if Morsey failed to make any such payment, Morsey would forfeit his Participation; (d) that Green would receive a substantial real estate commission in connection with the transaction; (e) that there were additional fees and expenses which Morsey would be required to pay over and above the $250,000 purchase price of the Participation in connection with the consummation of the purchase of the real estate, including a substantial legal fee to Broberg; (f) that commercial exploitation of this real estate was highly improbable because almost the entire area was (and still is) zoned for agricultural use only and the Orange County Planning Department had in 1972 officially classified the real estate as "Agriculture" and "Flood Plains."

28. In the latter part of June, 1973, Morsey received numerous documents from Broberg, who was Green's attorney and agent. Broberg requested that Morsey execute and return the Trust Agreement.

29. These documents comprised only a portion of the closing documents (the "Closing Documents") generated in connection with the purchase of the real estate and included a Trust Agreement dated as of June 20, 1973 (the "Trust Agreement") between First National and the beneficiaries named therein.

30. Neither Green nor his agent Broberg disclosed to Morsey the contents of the Closing Documents and particularly the contents of the Trust Agreement. In fact, Green assured Morsey that there was nothing out of the ordinary in the documents.

31. Relying thereon, Morsey executed the Trust Agreement and mailed it in New York City to Broberg in Florida.

32. Green and Broberg's statements contained misstatements of material facts and omitted to state material facts necessary to make their statements not misleading.

33. The representations that Green directly and through his agent and attorney Broberg indirectly made to Morsey were materially false in that, among other things,

(a) the price for the Magnolia Ranch was not favorable; the Ranch property was not worth $1100 per acre;

(b) Green did not have prospective investors ready to purchase the property and in fact, as of the time of this Second Amended Complaint, Green has never found a purchaser for the Magnolia Ranch, and the Ranch is now being foreclosed against Morsey and the other investors in Green's syndication;

(c) Green had no plan and in fact had only briefly visited the area of the Ranch on one occasion subsequent to conceiving the idea of purchasing it;

(d) although Green apparently was involved in many other syndications and therefore was uniquely involved in the market for Central Florida syndications, Green was not able to and did not use his position to

effect an increase in the market price and to find any other purchaser for the property;

(e) although Green did for all of the period of time from Morsey's investment to the commencement of this lawsuit engage in management of the Magnolia Ranch, both directly and indirectly through the sellers of the said Ranch, and among other things, effected an increase in the operating income of one of the portions of the ranch operations, Green was not able to make the Magnolia Ranch operations sufficiently profitable or to sell the Ranch in a sufficiently short period of time to avoid the heavy encumbrances of the federal land bank mortgage or the second mortgage due to the sellers;

(f) contrary to the apparent terms of the Trust Agreement, Morsey and the other investors did not have any voice in the management or have any right to affect or change any decisions being made by Green. By prearrangement and based upon the history of Green's dealing with First National, First National yielded all management decisions to Green and became and was Green's agent to manage the Magnolia Ranch;

(g) Green had no expertise in operation or management of operating properties such as the Magnolia Ranch;

(h) Green had no "plan" for developing Magnolia Ranch with golf courses, homes, ranchettes, and the like, and knew that the appropriate governmental authorities had in fact zoned and planned the area of the Magnolia Ranch as "Agricultural Flood Plains" and did not permit the Terrys or Green to

develop the property in question in accordance with Green's putative "plan."

34. Among the other omissions to state material facts to Morsey, Green failed to disclose to him that:

(a) the zoning history and the true development potential of the Magnolia Ranch contradicted Green's "plan";

(b) Green's prior repeated use and control both of First National and of Broberg as his agents in operating such syndications for all practical purposes as if Morsey and the other investors were limited partners;

(c) neither Broberg nor First National would, nor had they in other syndications in the past, question or dispute any actions by Green with reference to the investment;

(d) Green had committed himself to purchase the Magnolia Ranch real estate before he sold the Participation to Morsey;

(e) Green had an additional pecuniary interest in the promotion of the real estate venture in that he would receive a substantial commission in connection therewith;

(f) further, Green's pecuniary interests in the venture's promotion placed him in a conflict of interest with Morsey;

(g) Green did not disclose this conflict of interest to Morsey prior to selling Morsey the Participation.

35. At the time of the purchase of the Participation, the transmittal, execution and delivery of the Trust Agreement and on numerous occasions thereafter, up to and including August of 1975, Defendants repeated and reaffirmed the misrepresentations referred to above and continued to conceal the omissions referred to above.

36. At the time of the offer for sale and sale of the Participation and at the times of the subsequent misrepresentations and omissions referred to above, Green knew or should have known (a) that the representations made to Morsey were false, and (b) of the existence of the material omissions and Morsey's ignorance thereof.

37. Prior to the purchase of the Participation, Morsey advised Green that Morsey did not have sufficient liquid resources to purchase the Participation and that he would have to borrow the funds from his bank in order to consummate the purchase.

38. Green knew that it was improper and imprudent for Morsey to borrow the funds to purchase the Participation and remained silent.

39. Green made the foregoing misrepresentations and omissions in order to induce Morsey to purchase the Participation and to borrow the funds required.

40. First National knew or should have known of Green's misrepresentations and omissions and failed to inform Morsey thereof.

41. Morsey relied upon the misrepresentations and omissions in purchasing the Participation and borrowing the necessary funds.

42. For some time prior to the offer for sale and sale of the Participation and thereafter, Green cultivated a close personal relationship with Morsey and held himself out to Morsey as an expert in Florida real estate transactions.

43. Green solicitated and obtained Morsey's trust and confidence as an advisor to Morsey in connection with Florida real estate matters. As a consequence, Green placed himself in a fiduciary relationship vis-a-vis Morsey.

44. As a consequence of the aforesaid relationship, Green owed a duty to Morsey of full and fair disclosure concerning the real estate transaction and the Participation.

45. Green breached his duty as Morsey's fiduciary and agent.

46. Additionally, upon information and belief, Green held himself out as an advisor to numerous other individuals with respect to Florida real estate matters and the investment merits of participations similar to Morsey's participation.

47. Upon information and belief, Green was not and is not registered as an "investment advisor" under the 1940 Act or the Florida Blue Sky Laws.

48. First National executed and delivered the Trust Agreement as Trustee for the benefit of Plaintiff and the other beneficiaries named in the Trust Agreement.

49. By virtue of its execution and delivery of the Trust Agreement and its undertaking to Act as Trustee for the beneficiaries named herein, First National entered into a fiduciary relationship vis-a-vis Morsey and the other beneficiaries.

50. First National knew or should have known of the misrepresentations and omissions referred to above and failed to make full and fair disclosure thereof to Morsey.

51. As a consequence, First National breached its fiduciary duties to Morsey.

52. The Trust Agreement provides, in part, as follows: "that in transacting any business relative to the property . . . the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with his percentage of ownership . . . . ."

53. Upon information and belief, on several occasions during the period June, 1973, through and including the date hereof, First National failed to solicit and obtain the Beneficiaries' consent to various material transactions involving the assets of the Trust and, in

particular, disbursements to Green. Over $100,000 of funds were expended without the investors' approval.

54. First National, contrary to the provisions of the Trust Agreement and in violation of its duties as Trustee, followed Green's directions with respect to the Trust.

55. As Trustee, First National was required to provide Morsey and other beneficiaries of the Trust with regular periodic accountings and with the information necessary to prepare their tax returns on a timely basis.

56. First National failed to do so. In the Spring of 1974, First National failed to provide Morsey with the information required for his tax return in a timely fashion and stated to Morsey that it had been instructed by its accountant to withhold such information.

57. The withholding of such information was in furtherance of Green's scheme to violate the 1933 Act, the 1934 Act, the Florida Blue Sky Laws and the New York Blue Sky Laws and to defraud Morsey.

58. In 1975, when Morsey advised Green that he could not continue to advance funds to the Trust, Green assured Morsey that he would not lose the Participation.

59. Green had previously advised, represented and promised to Morsey that Morsey could not and would not lose his Participation and, in this regard, caused Broberg to send Morsey papers showing that Green and Green's wife had in fact entered into a guarantee of the payment of the second mortgage to the Terrys. By so doing, in addition to his other obligations

to Morsey, Green entered into a contract of which Morsey was the third party beneficiary. Green has subsequently failed to honor that guarantee, breaching his contractual as well as his disclosure duties to Plaintiff, for he had represented in the delivery of the article annexed to this Second Amended Complaint that he, Green, had assets in excess of $50 million.

60. In July, 1975, Green, through his agent Broberg, sought to obtain Morsey's agreement to relinquish all of Morsey's right, title and interest in and to the Participation.

61. In connection therewith, Green failed to make full and fair disclosure to Morsey of all of the facts and circumstances relevant thereto.

62. Green's efforts to induce Morsey to relinquish his interest in the Participation were wrongful and were made with the intent to further defraud Morsey.

63. The solicitation of Morsey's consent to relinquish his interest in the Participation was made in violation of the 1933 Act, the 1934 Act, the Florida Blue Sky Laws and the New York Blue Sky Laws, and constituted a continuing attempt to cover up the prior misstatements and omissions to make statements to Morsey.

FACTUAL BACKGROUND WITH REFERENCE TO BROBERG

64. As part and parcel of the series of transactions described above, Broberg, Reid, and Coe, Broberg & Reid undertook to provide competent legal services in a manner commensurate with the standards of legal practice in the community or in like communities on behalf of Morsey.

65. Specifically, Broberg, on behalf of himself and of the defendant partnership and its partners, undertook to represent Morsey in the acquisition of the Magnolia Ranch and sought and received substantial attorneys' fees from Morsey for said undertaking.

66. Contrary to their undertaking and in violation of their contractual duties and their duty of due care under all circumstances, defendant attorneys breached their contract of representation and failed to perform their undertaking with the requisite due care and/or in the alternative, committed gross negligence in their representation of Morsey, initially and throughout the course of the still on-going transaction.

67. As a result of their said breach of contract, negligence and/or gross negligence, defendant attorneys, jointly and severally, caused Morsey to suffer damages in amounts in excess of $500,000.

68. In addition thereto, defendant attorneys' activities caused Morsey to be required to expend sums of money for attorneys' fees and costs.

69. Defendant attorneys are therefore jointly and severally liable to Morsey for compensatory damages in excess of $500,000, for punitive damages for their gross negligence, and for attorneys' fees, pre-judgment interest and costs.

COUNT I

CLAIM AGAINST GREEN, FIRST NATIONAL AND BROBERG FOR VIOLATION OF SECURITIES LAWS

70. Plaintiff realleges Paragraphs 1 through 69, inclusive.

71. The Participations were "securities" and were not registered.

72. The actions of Green, First National, and Broberg were fraudulent and deceptive.

73. Green offered the investment to an unknown number of investors in New York, Florida, Illinois and Minnesota.

74. The actions of Green, First National, and Broberg constituted violations of the Federal, New York, and Florida securities laws.

75. Morsey was damaged thereby.

COUNT II

CLAIM AGAINST GREEN, FIRST NATIONAL, BROBERG, REID, AND COE, BROBERG & REID FOR VIOLATION OF FLORIDA STATUTES §§517.21(1)

76. Plaintiff realleges Paragraphs 1 through 69, inclusive.

77. First National, Broberg, Reid, and Coe, Broberg & Reid, were agents of and for Green and personally participated and aided and abetted Green in making the sale of the Participation to Morsey and perpetrating this scheme to defraud Morsey and the other investors, all in violation of Florida Statutes Chapter 517.

78. Morsey was damaged thereby.

COUNT III

CLAIM AGAINST GREEN FOR VIOLATION OF 1940 ACT

79. Plaintiff realleges Paragraphs 1 through 69, inclusive.

80. Green was not a registered investment advisor under the 1940 Act.

81. Green's actions therefore violated the 1940 Act.

82. Morsey was damaged thereby.

COUNT IV

CLAIM AGAINST GREEN, FIRST NATIONAL, BROBERG, REID, AND COE, BROBERG & REID, FOR FRAUD

83. Plaintiff realleges Paragraphs 1 through 69, inclusive.

84. Defendants Green, First National, Broberg, Reid, and Coe, Broberg & Reid, were therefore guilty of fraud against Morsey under the securities laws and under common law.

85. Morsey was damaged thereby.

COUNT V

CLAIM AGAINST GREEN AND FIRST NATIONAL FOR BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT

86. Plaintiff realleges Paragraphs 1 through 69, inclusive.

87. Defendants Green and First National therefore violated their fiduciary duties to Morsey.

88. Morsey was damaged thereby.

COUNT VI

CLAIM AGAINST GREEN FOR BREACH OF REAL ESTATE BROKER'S DUTIES

89. Plaintiff realleges Paragraphs 1 through 69, inclusive.

90. Such conduct violated Green's duties to Morsey as a licensed Florida realtor.

91. Morsey was damaged thereby.

COUNT VII

CLAIM AGAINST BROBERG, REID AND COE, BROBERG & REID FOR BREACH OF DUTY OF LEGAL REPRESENTATION

92. Plaintiff realleges Paragraphs 1 through 69, inclusive.

93. Defendant attorneys' actions fall below the standard of legal care required of attorneys in the community.

94. Morsey was damaged thereby.

COUNT VIII

CLAIM AGAINST LEGAL NEGLIGENCE INSURER AS DIRECT ACTION

95. Plaintiff realleges Paragraphs 1 through 69, inclusive.

96. On information and belief, at all times material to this Second Amended Complaint, defendant attorneys were covered by a contract of liability insurance for matters arising out of incidents such as those set forth above; such insurance company, under *Shingleton v. Bussie,* is a real party in interest in this suit, amenable to a direct action by Morsey in this cause, and upon the discovery of the identity of said insurance company, Morsey will seek to amend to join said insurance company as a party defendant.

WHEREFORE, Plaintiff demands judgment against Defendants and each of them as follows:

A. Rescission of the sale of the Participation and a return of all consideration paid therefor plus interest thereon.

B. Damages in an amount in excess of Five Hundred Thirty Thousand Dollars ($530,000.00), plus interest from December 31, 1975, for the loss sustained by Plaintiff as alleged herein in connection with Plaintiff's purchase of the Participation.

C. Damages in an amount as yet undetermined for such future losses as the evidence may show to have been sustained by Plaintiff after December 31, 1975.

D. Interest on the amounts referred to in Paragraphs A and B above.

E. Punitive damages in the sum of One Million Dollars ($1,000,000.00).

F. The cost and disbursements of this action, including reasonable attorneys' fees.

G. Such other and further relief of an equitable or legal nature, or both, as the Court may deem just and proper.

/s/ Guy B. Bailey, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. WPB 76-8044-Civ-CA

ORDER

THIS CAUSE having come before the Court on motion of defendants to dismiss for lack of subject matter jurisdiction, and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is GRANTED. The transactions herein are similar to those in *Gordon v. Green,* et al, WPM 76-8151-8155-Civ-CA, the Order of Dismissal of which is attached. There, this Court ruled that the transactions did not constitute a securities transaction under Federal law (to wit, Section 2(1) of the 1933 Act), thereby divesting the Court of Jurisdiction.

ACCORDINGLY, this cause is dismissed. The state claims averred under the doctrine of pendent jurisdiction are dismissed without prejudice to refiling before a court of competent jurisdiction.

DONE AND ORDERED at Miami, Florida, this 28th day of October, 1976.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

ORDER

Plaintiff's motion for a rehearing is granted. An evidentiary hearing on the question of whether or not a security transaction was involved is set for December 14, 1976, at 8:30 A.M. The Court will enter findings of fact and conclusions of law, and thus the parties should file proposed findings and conclusions.

DONE AND ORDERED at Miami, Florida, this 30th day of November, 1976.

/s/C. Clyde Atkins
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

FINDINGS OF FACTS & CONCLUSIONS OF LAW

RE: Rule 42(b) Hearing on the Issue of Whether A Security was Transacted

THIS MATTER is before the Court on a Rule 42(b) hearing to determine whether or not a securities transaction occurred in the case *sub judice*. Upon reviewing the testimony from the witness Morsey, the exhibits received in evidence (to the extent they are relevant), the parties' extensive memoranda of law, and the relevant authorities, the Court herby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On or about May 18, 1973, defendant Elmer G. Green (hereinafter referred to as "Green") while in Florida telephoned plaintiff, Chasey Morsey, Jr. (hereinafter referred to as "Morsey") in New York City and offered Morsey the opportunity to purchase an interest in certain Florida real estate.

2. At or about the same time, or thereafter, Green represented to Morsey the possibility that the described real estate had certain income-producing assets.

3. Green represented to Morsey the possibility that such income-producing assets on the property could be used to partially offset mortgage payment obligations and other expenses incurred by the purchasers of such property.

4. Green's plan and Morsey's reason for purchasing was the expectation of profit and a rise in its value and resale, and the realization of income generated by on-going business thereon.

5. Pursuant to the trust agreement (defendants' Exhibit 2), Morsey had substantial pro rata control over the operation of said businesses.

6. Green did not make any representations to Morsey that Green will undertake the responsibility of developing the land.

7. Green represented to Morsey that the property would be purchased by The Heminway Corporation and thereafter transferred to a bank, as trustee, under a trust agreement for the purposes of holding title and to provide anonymity for the initial investors who would become beneficiaries under the trust.

8. By letter delivered May 19, 1973, Green provided Morsey with certain financial details of the proposed investment.

9. On June 8, 1973, Morsey accepted Green's offer and mailed to Green in Florida a check payable to Green.

10. During June, 1973, the subject property was purchased in the name of The Heminway Corporation.

11. During June, 1973, Morsey received certain documents from Attorney Gustav Broberg (hereinafter referred to as "Broberg"), that is, closing documents relating to the purchase of the property. In addition, Morsey received a proposed trust agreement between Morsey and others as beneficiaries, and the First National Bank in Palm Beach, as Trustee.

12. Morsey executed the trust agreement (defendants' Exhibit 2) and mailed it to Broberg in Florida.

13. In June, 1973, the subject property was transferred to the Bank, as Trustee.

14. Any resale of the property was governed by the terms of the trust agreement entered into by Morsey, which provided that he and the other investors would be governed by a majority consent of the beneficiaries regarding the sale and the terms under which the sale of the property would be made, and in accordance with their percentage of ownership.

15. As indicated in Findings 5 and 6 *supra*, Morsey was not led to expect profit solely from the efforts of Green or any other third party.

CONCLUSIONS OF LAW

1. An investment contract is, within the meaning of the Securities Act of 1933 (15 U.S.C. §77b(1)) and the Securities Act of 1934 (15 U.S.C. §78c(a)(10)), "a

contract, transaction or scheme whereby (1) a person invests his money (2) in a common enterprise and (3) is led to expect profits (4) solely from the efforts to the promoters or a third party." *SEC v. Howey*, 328 U.S. 293, 298-299 (1946).

2. The "solely" aspect of the fourth prong of the *Howey* test means "[T]hose essential managerial efforts which affect the failure and success of the enterprise." *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973), *accord SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974).

3. Whether a particular investment scheme may be characterized as a securities transaction depends upon the facts and circumstances of each case, and the Court must focus upon the "economic reality" of the transaction. *SEC v. Joiner Corp.*, 320 U.S. 344 (1943). *See also Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967).

4. In determining whether an instrument partakes of the nature of a §2(1) "security," the court must consider "the methods used in selling" the instrument. *Gringer v. State Security Life Insurance Co.*, Slip. Op. No. 75-301, p. 1620, 1623 (5th Cir., Feb. 18, 1977).

5. Morsey's investment and involvement in a joint venture with the expectation he would profit from a rise in the value of the property upon his decision and that of the other beneficiaries to sell or the expectation of profits from on-going business of which he had substantial control did not constitute the acquisition or sale of a security under federal law. *Van-Arsdale v.*

Claxton, 391 F.Supp. 538 (S.D. Cal. 1975); *Oxford Financial Corp., Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974).

6. The sale of an interest in real estate is not a security under the New York Blue Sky Laws. *Reiter v. Greenburg*, 288 N.Y.S. 2d 57 (N.Y. App. 1968; *Maxine Gerard, Inc. v. Fisher*, 314 N.Y.S. 2d 688 (S.Ct. N.Y. 1970).

To the extent that the above Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that the above Conclusions of Law constitute Findings of Fact, they are adopted as such.

The Court will enter an Order in conformance with the foregoing Findings of Fact and Conclusions of Law.

ENTERED at Miami, Florida, this 23rd day of March, 1977.

/s/ C. Clyde Atkins
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1973

CHASE MORSEY, JR.,
Plaintiff-Appellant,

versus

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH, individually and as Trustee u/a dates as of June 20, 1973,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(APRIL 11, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS*, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

*District Judge of the Southern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1973

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(May 9, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and DANIEL H. THOMAS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

*District Judge of the Southern District of Alabama, sitting by designation.

SUPREME COURT, U.S.
FILED
SEP 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-200

In the Supreme Court of the United States

October Term, 1979

CHASE MORSEY, JR.,
Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT ELMER G. GREEN IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE COURT OF APPEALS' PER CURIAM AFFIRMANCE AND DENIAL OF REHEARING PRESENT JUSTIFICATION FOR REVIEW BY CERTIORARI WHEN:

A. The Order Of Dismissal By The Trial Judge Was Proper Under Established Law Regarding The Court's Determination Of Its Subject Matter Jurisdiction And Did Not Deny Morsey Any Right To A Jury Determination.

B. Morsey Waived Any Right To A Jury Trial On The Existence Of Securities Issue.

C. Morsey Failed To Object To, Or To Timely Raise On Appeal The Issue Of His Asserted Right To A Jury Trial.

D. In Determining Morsey's Interest Was Not A Security, The Courts Below Properly Applied The Relevant Case Law.

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No. 80-200

In the Supreme Court of the United States

October Term, 1979

CHASE MORSEY, JR.,
Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT ELMER G. GREEN IN OPPOSITION

STATEMENT OF THE CASE

Course of Proceedings Below

Respondent, ELMER G. GREEN, adopts the statement of course of proceedings below submitted in this case by Respondent, FIRST NATIONAL BANK IN PALM BEACH, with the following additions:

Following the District Court's dismissal for lack of subject matter jurisdiction (PA 26),[1] Morsey moved for a rehearing on the grounds *inter alia* that he had not been given the opportunity to present his case on the jurisdictional issue *to the Court* (emphasis added) (R. 418-419). The District Court granted rehearing and scheduled an evidentiary hearing on the question of whether or not security transaction was involved; the order informed the parties the Court would enter findings of fact and conclusions of law and requested the parties submit proposed findings of fact and conclusions of law to the Court (PA 27). Prior to the hearing, Morsey submitted proposed findings of fact and conclusions of law to the Court (R. 455-461). At the evidentiary hearing Morsey produced evidence, primarily his own testimony (EVH 1-77), and also offered documentary evidence (EVH 8, 28).

STATEMENT OF THE FACTS

Respondent GREEN adopts without addition the statement of the facts submitted by Respondent, FIRST NATIONAL BANK IN PALM BEACH, in this case.

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1. References herein are to the record (R.) as paginated in the Court of Appeals. Exhibits were not indexed in the appellate record. Transcripts of hearings were separately bound and paginated, *e.g.*, (EVH) = Evidentiary hearing on motion to dismiss; (R. Vol. pp.) = Trial on the Merits. (PA) = Appendix to Petition for Writ of Certiorari; (RA) = Appendix to the brief of this Respondent Green in opposition.

SUMMARY OF ARGUMENT

As to Question I. Presented by Morsey

Defendant's Motion to Dismiss put at issue the trial court's subject matter jurisdiction which is ultimately a question of law for the Court. According to the power and discretion given it by the Federal Rules of Civil Procedure and established case law, the trial court in this case held an evidentiary hearing, made findings of fact and dismissed portions of Morsey's Complaint because the Court lacked subject matter jurisdiction. Morsey, represented by counsel, participated without objection in this proceeding and thereby waived any right to a jury trial, rendering this question moot and not appropriate for review by this Court on certiorari. Morsey failed to preserve the alleged error presented in this question in the trial court and Circuit Court of Appeals, thereby waiving it. Further, Morsey's Petition fails to show the extraordinary circumstances required for this Court to consider this question not properly raised below.

As to Question II. Presented by Morsey

There is no question that real estate investments and land syndications are subject to federal securities' laws if the well-settled definitional tests of the Statutes and established case law are met. Definitions in Statutes and case law cannot cover every possible fractional situation. However, settled federal case law provides ample definitional tests of what constitute "securities" or "investment contracts", "profits", and "efforts of others", to apply to cases such as this one. This law was correctly applied by the trial court and the Court of Appeals properly affirmed the trial court because its findings of fact were not clearly erroneous and supported the dismissal under established case law. In this case, Morsey merely failed to present sufficient facts required under the law to give the Court subject matter jurisdiction.

ARGUMENT

I.

Morsey's Petition fails to address the considerations of this Court's Rule 17 directly, but the Petition apparently asserts that this Court should grant certiorari as to the first question presented:

1. To settle expressly and definitely in the absence of clearly controlling case law, whether the fact questions necessary to determine the existence of a security are for the jury; and

2. To correct what Petitioner asserts to be the denial of his Ninth Amendment right to a jury trial resulting from the District Court Judge dismissing portions of his Complaint on the grounds of lack of subject matter jurisdiction and based upon findings of fact made by the Court.

A. The Order Of Dismissal By The Trial Judge Was Proper Under Established Law Regarding The Court's Determination Of Its Subject Matter Jurisdiction And Did Not Deny Morsey Any Right To A Jury Determination.

It is well-established that when the Court's subject matter jurisdiction is questioned, the Court may hold evidentiary hearings, receive evidence, resolve factual issues and make findings of fact to determine its jurisdiction[2] without that determination constituting deprivation of any right to a jury trial.[3] Further, when the Court in its discretion decides to determine its jurisdiction prior to a trial on the merits, the Plaintiff, like Morsey in this case, can

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2. *E.g., Gibbs v. Buck*, 307 U.S. 66 (1939); *State of Alabama Ex Rel. Baxley v. Woody*, 473 F.2d 10, 12 (5th Cir. 1973).

3. *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972).

be required to establish the jurisdictional facts by a preponderance of the evidence.[4]

Cases specifically considering whether a "security" was involved in civil cases under the federal securities laws also establish that the question is ultimately one of law for the Court. *Great Western Bank and Trust v. Kotz*, 532 F.2d 1252, 1255 (9th Cir. 1976); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). Even though under certain circumstances the Court could allow the jury to determine if a security was transacted, the question of whether the relevant facts present a jury question is itself a question of law for the Court.[5]

As discussed more fully *infra* Morsey participated in the instant evidentiary hearing without objection. His Petition cites no fact found by the trial judge which Morsey asserts is clearly erroneous on the basis of the record. His Petition cites no specific facts in dispute which required submission to the jury to resolve the existence of a security issue, and prevented the judge from determining there was no jury question as a matter of law. Therefore Morsey's Petition fails to show any abuse of power or discretion by the trial court or error by the Court of Appeals.

B. Morsey Waived Any Right To A Jury Trial On The Existence Of Securities Issue.

It has long been the position of this Court that any Seventh Amendment Right to a jury trial in a civil case can be waived by participation without objection in trial of a matter by the Court. *See, e.g., Duignan v. United*

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4. *McNatt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285, N. 2 (9th Cir. 1977).

5. *Kotz*, 532 F.2d at 1255.

States, 274 U.S. 195, 198 (1927). Established subsequent case law shows that Morsey's participation in the instant evidentiary hearing constituted a waiver of any right he had to a jury trial on the issue of whether a security was transacted.

In *National Family Insurance Company v. Exchange National Bank of Chicago,* 474 F.2d 237, 241 (7th Cir. 1973), *cert. denied,* 414 U.S. 825 (1973) the Court determined under "ample authority" that Plaintiff had waived any right to a jury trial on the issue of the Statute of Limitations raised by a Motion to Dismiss when it participated without objection in a factual hearing held before the Court solely to determine that issue. In applying the law, the facts the Court found determinative are present in this case; the Plaintiff, like Morsey, made no objection to the procedure and participated fully in it by presenting witnesses,[6] documentary evidence,[7] and arguments by counsel on its own behalf.[8] 474 F.2d 241.

In *Southland Reship, Inc. v. Flegel,* 534 F.2d 639, 643-645 (5th Cir. 1976), the Court considered Plaintiff's argument that since he had filed a general demand for a jury trial and had made no formal oral stipulation waiving a jury trial on the liability issue, the trial Judge's adverse determination on that issue following a consolidated hearing on preliminary and permanent injunctions deprived him of his right to a jury trial. The Court affirmed the trial court at 534 F.2d 645, on the grounds Plaintiff had waived any right to a jury trial on that liability issue. The facts the Court found determinative were:

(1) The period of over one month between notice of the hearing and the holding of the hearing, giving coun-

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6. EVH 1-77.
7. EVH 8, 28.
8. EVH 55-60.

sel ample time to determine the effects of the hearing and to object;

(2) The record of the hearing showed Plaintiff knew the issue of liability was being presented to the Court, but did not assert any claim of right to a jury trial except to the damage issue;

(3) The Court requested the parties to submit proposed findings of fact and conclusions of law which included the liability issue, and Plaintiff did so without objection. 534 F.2d 644. Similar determinative facts are present in this case.[9]

Even assuming, *arguendo*, that Morsey had any right to a jury trial on the issue of whether a security was involved, it is clear on the facts and record of this case that under established and non-conflicting decisions Morsey waived any right to a jury trial as to that issue. Therefore, Question I presented by Morsey is moot and obviously not appropriate for review by this Court on certiorari.

C. Morsey Failed To Object To, Or To Timely Raise On Appeal The Issue Of His Asserted Right To A Jury Trial.

This Court has consistently determined that issues and questions not pressed or passed upon in the lower Court

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9. Morsey had ample time from the notice of the hearing to determine the effects and object (PA 27 and R. 532, 619, 626); he made no mention of a right to a jury trial at the evidentiary hearing and it is clear that he understood that the subject matter jurisdiction issue was the sole issue under consideration (PA 27), and (EVH 3-4); he submitted proposed findings of fact and conclusions of law prior to the hearing (R. 455-461). *See, also, Smith v. Cushman Motor Works*, 178 F.2d 953 (8th Cir. 1950), where the Court found the Appellant waived any right to a jury trial on the issue as to the existence of the contract sued on when he failed to object to the hearing and determination of that issue by the Court; and *cf., West v. Devitt*, 311 F.2d 787, 788 (8th Cir. 1963), and *Maytag Co. v. Meadows Mfg. Co.*, 45 F.2d 299, 301-302 (7th Cir. 1930), *cert. denied*, 283 U.S. 843 (1931).

will not be considered or resolved by this Court except in exceptional cases.[10] It is also well settled that because the Appellant is asserting the denial of a constitutional right not raised or considered below does not in and of itself justify review by this Court.[11] Morsey's Petition on its face lacks any showing of facts that this case involves any "exceptional circumstances" such as those which have been found to justify an initial review by this Court.[12]

Morsey, though represented by counsel at all stages of the case below never raised objection in the trial court on denial of jury trial grounds to the holding of the evidentiary hearing or the entry of the dismissal upon the findings of fact by the Court. Under well-established authority his failure to object waived his right to claim error in the Court of Appeals.[13]

There is also specific authority that when a party raises the issue of an alleged right to a jury trial for the first time on appeal it is too late for that argument to be considered.[14] Established authority also shows that raising issue for the first time on Petition for Rehearing in the Court of Appeals will prevent the issue from being con-

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10. *E.g., Duignan, supra,* 274 U.S. 200; *California v. Taylor,* 353 U.S. 553, 557, N. 2 (1957); *Lawn v. United States,* 355 U.S. 339, 362-363, N. 16 (1958).

11. *Duignan, supra,* 274 U.S. at 200.

12. This case is distinguishable from cases in which exceptional circumstances have been found, *e.g., Pollard v. United States,* 352 U.S. 354 (1957), in which the Petitioner was proceeding *pro se* and therefore was permitted to raise constitutional arguments for the first time in this Court.

13. *Basham v. Finance America Corp.,* 583 F.2d 918, 922 (1978), *cert. denied, sub nom. DeJaynes v. General Finance Corp. of Ill.,* 439 U.S. 1128 (1979); *Stephens v. Arrow Lumber Company,* 354 F.2d 732, 734 (9th Cir. 1966).

14. *National Family, supra,* 474 F.2d 241; *Simpson v. Union Oil Company of California,* 411 F.2d 897, 901 (9th Cir. 1969), *rev'd on other grounds,* 396 U.S. 13 (1969).

sidered.[15] Morsey raised the issue of denial of his right to a jury trial for the first time on Petition for Rehearing—no such issue was raised in his brief on appeal (RA 1).

Morsey obviously did not feel the alleged error presented in Question I was significant enough to raise until he was turned back by the Court of Appeals on all his other arguments. Now, without any factual basis in his Petition showing "exceptional circumstances" he seeks to protract this case under the guise that an important legal issue is presented to this Court for resolution. From the above analysis it is clear that the decision of the Court of Appeals was justified by the application of settled law to the case under factual circumstances where neither the District Court nor Court of Appeals thought sufficient legal questions were involved to justify written opinions. Such a case does not seem worthy of this Court's attention on certiorari and it should adhere to its policy that where there is no lower Court opinion on a legal issue the Court declines to consider the legal claim. *National Labor Relations Board v. Sears, Roebuck & Company,* 421 U.S. 132, 163-4 (1975).

D. In Determining Morsey's Interest Was Not A Security, The Courts Below Properly Applied The Relevant Case Law.

Morsey asserts this Question II is appropriate for review by writ of certiorari in order to:

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15. *Joseph v. Blair,* 488 F.2d 403, 404 (4th Cir. 1973), *cert. denied,* 416 U.S. 955 (1974); *Real v. Simon,* 514 F.2d 738, 739 (5th Cir. 1975); *Bullock v. Mumford,* 509 F.2d 384, 388 (D.C. Cir. 1974), finding assertion of violation of constitutional right of due process not dealt with in opinion of the Court came too late and did not require reconsideration on rehearing; *Jamestown Farmer's Elevator, Inc. v. General Mills,* 552 F.2d 1285, 1295-6 (8th Cir. 1977).

(1) determine and clarify the applicability of the securities laws to land syndications[16] and real estate investments,[17] and;

(2) to clarify the meaning of "profits" and "efforts" tests applied in determining whether a security was transacted.[18]

The necessity of such clarification or resolution is not presented by this case. It is well established that securities' laws apply to real estate investments and syndications when the long-established definitional tests of *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) are met after a consideration of the economic realities and total circumstances surrounding the transaction. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); *Tcherepin v. Knight*, 389 U.S. 332 (1967); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943).[19]

It is clear in this case that the Court applied the relevant definitional tests established by this Court.[20] The trial court's findings of fact and conclusions of law show the economic realities and total circumstances were con-

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16. Morsey's Petition, p. 17.

17. *Id.* at p. 21.

18. *Id.*

19. *See*, numerous cases cited in Morsey's Petition, pp. 20-21, N. 14.

20. *See*, PA pp. A. 30-32. The Court cited *Howey, supra*, 328 U.S. 298-299 (1946); *SEC v. Glenn W. Turner Enterprises*, Inc., 474 F.2d 476, 482 (9th Cir. 1973); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974); *Joiner, supra*, 320 U.S. 344; *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967); *Grainger v. State Security Life Insurance Co.*, Slip Op. No. 75-301, pp. 1620, 1623 (5th Cir. Feb. 18, 1977); *Van Arsdale v. Claxton*, 391 F.Supp. 538 (S.D. Cal. 1975); *Oxford Finance Companies, Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974). Green submits none of these opinions conflict with decisions of this Court and they clearly support the dismissal entered by the Court on the facts found.

sidered and supported the dismissal under the established authority of the Court and the additional authority cited by the Court.[21]

Morsey suggests that case authority cited by the District Court and certain facts on which it relied conflict with other cases applying the "profits" test.[22] He attempts to support this argument by factoring out single aspects of those cases and contrasting their holdings or the result in this case. This argument ignores that under the established tests the comparison needs to be made upon the total circumstances of each transaction.

What Morsey attempts to suggest is conflict and ambiguity in the law represented by these cases is really just the several courts applying the established definitional tests of *Howey* and the gloss of subsequent decisions of this Court to the unique and multifarious circumstances before them. The tests were developed for just that purpose.[23]

Morsey also argues the District Court erred in determining that he did not rely on the efforts of others.[24] In support he would have this Court rely on the allegations and conclusions in his argument (without reference to or support in the record) rather than on the factual conclusions rendered by the Court after sworn testimony. His Petition therefore fails to provide any basis upon which

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21. PA pp. A. 28-30.

22. Morsey's Petition at pp. 18-19. Morsey suggests *Van Arsdale v. Claxton*, 391 F.Supp. 538 (S.D. Cal. 1975) relied on by the District Court (PA pp. A. 31, 32) conflicts with *Altschuler v. Cohen*, 471 F.Supp. 1372 (S.D. Tex. 1979) and *Bartels v. Algonquin Properties, Ltd.*, 471 F.Supp. 1132 (D. Vt. 1979). These District Court cases, even if they conflicted, could not be used to establish the "conflict" consideration under this Court's Rule 17(a).

23. *Howey, supra*, 328 U.S. 1103.

24. Morsey's Petition, pp. 19-21.

this Court could determine the Court of Appeals erred in determining the District Court's fact findings were not clearly erroneous and the record revealed no error of law.

CONCLUSION

Morsey has failed to meet his Rule 17 burden. His Petition reveals no special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; further, the decision below was correct in finding neither the findings of fact nor conclusions of law erroneous. Respondent Green requests that the Petition for Certiorari be denied.

Respectfully submitted,

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APPENDIX TO RESPONDENT ELMER G. GREEN'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF ISSUES PRESENTED IN MORSEY'S BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE ISSUES

I. WHETHER THE PARTICIPATION MORSEY PURCHASED FROM GREEN IS A SECURITY.

II. WHETHER THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON FLA. STATUTE §475.25.

III. WHETHER THE DISTRICT COURT DENIED MORSEY A FAIR TRIAL.

Supreme Court, U. S.
FILED
SEP 8 1980
MICHAEL RODAK, JR., CLERK

Case No. 80-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHASE MORSEY, JR.,
Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK
IN PALM BEACH,
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN PALM BEACH, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DETERMINING WHETHER OR NOT IT HAD SUBJECT MATTER JURISDICTION OVER FEDERAL SECURITY LAWS CLAIMS, AND THAT THERE WERE NO MATERIAL FACTS FOR THE JURY?

II

SHOULD THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW A QUESTION NOT PRESERVED OR PASSED UPON BELOW?

III

WHETHER PETITIONER'S PURCHASE OF AN INTEREST IN REAL ESTATE, AND ITS EXISTING MINOR COMMERCIAL OPERATIONS, WITH THE EXPRESS EXPECTATION OF A FAST RESALE FOR A SUBSTANTIAL PROFIT BASED UPON THE VALUE OF THE PROPERTY, WHERE THE PETITIONER HAD THE RIGHT OF PRO RATA CONTROL OVER THE COMMERCIAL OPERATIONS AND THE SALE OF THE LAND, CONSTITUTED THE ACQUISITION OR SALE OF A SECURITY UNDER FEDERAL LAW?

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MORSEY WAS NOT IMPROPERLY DENIED A JURY TRIAL. THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THAT NO ISSUE EXISTED FOR THE JURY 9

II

MORSEY DID NOT OBJECT TO THE DISTRICT COURT'S DETERMINATION OF ITS OWN JURISDICTION, AND DID NOT PROPERLY OR TIMELY RAISE ANY SUCH ISSUE IN THE APPELLATE COURT. THIS COURT SHOULD NOT ENTERTAIN ISSUES WHICH HAVE NOT BEEN PROPERLY RAISED BELOW 11

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CASE NO. 80-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHASE MORSEY, JR.,
Petitioner,
vs.
ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN PALM BEACH, IN OPPOSITION

STATEMENT OF THE CASE

Course of Proceedings Below

Petitioner, Chase Morsey, Jr., ("Morsey") brought an action in the United States District Court for the Southern District of Florida against Elmer G. Green ("Green"), and the First National Bank in Palm Beach ("Bank"), alleging violations of the Securities Acts of 1933 and 1934 (15 U.S.C. §77A, *et seq.*, and 15 U.S.C. §78A, *et seq.*), The Investment Advisors Act of 1940 (15 U.S.C. §806, *et seq.*), and state law diversity actions (28 U.S.C. §1332) for securities violations, fraud and breach of fiduciary duty. (R. 1-16, 112-126).[1] Morsey then filed his

1/ References are to the record (R.) as paginated in the Court of Appeals. Exhibits were not indexed in the appellate record. Transcripts of hearings were separately bound and paginated, e.g., (EVH) = Evidentiary hearing on jurisdiction; (R. Vol. pp.) = Trial on the Merits. (PA) = Appendix to Petition for Writ of Certiorari; (RA) = Appendix to this Brief in opposition.

Second Amended Complaint (PA 1-25) adding other defendants, who were later dismissed upon settlement. (R. 844-845).

Green and the Bank moved to dismiss for lack of subject matter jurisdiction. The District Court originally dismissed the action without an evidentiary hearing, (PA 26), and Morsey moved for a rehearing (R. 418-419). The District Court granted rehearing, and scheduled an evidentiary hearing on the issue of subject matter jurisdiction. (PA 27). *Morsey presented no objection to this procedure in the District Court.* The hearing was postponed on several occasions (R. 532, 619, 626). At the hearing, Morsey produced evidence (documents and his own testimony) in an attempt to establish the District Court's subject matter jurisdiction of the federal securities transactions alleged. (EVH 1-77). Following the evidentiary hearing, the District Court dismissed all counts relating to securities violations, and entered an order with written findings of fact and conclusions of law. (R. 689-693; PA 28-32).[2] The District Court denied Morsey's motion (R. 694-695) to certify the case for an immediate appeal under 28 U.S.C. §1292(b). (RA 1).

Thereafter, the case went to trial upon Morsey's Third Amended Complaint, absent the security counts. The jury returned a Special Verdict (RA 3-6) in the form of written findings upon each issue of fact in favor of Green and the Bank, and judgment for defendants was entered. (R. 1453).

At the close of Morsey's case at trial, the District Court reaffirmed, from the bench, its earlier dismissal of the securities claims. (R. Vol. 10, pp. 654-655; RA 2). In part, the Court stated:

> . . . in light of all the relevant evidence gathered in this cause and now further confirmed at this trial, I hereby reaffirm my decision to dismiss all claims under the Federal and Florida securities laws. (RA 2).

2/ While the Order refers to the hearing as pursuant to Fed.R.Civ.P. 42(b), it is obvious that the hearing was held pursuant to Fed.R.Civ.P. 12(d).

On appeal to the United States Court of Appeals for the Fifth Circuit, Morsey did not challenge the procedure utilized by the District Court to determine its jurisdiction over the federal security claims. Morsey's Brief and Reply Brief only sought to retry the District Court's factual determination in this regard, and presented other issues involving discovery and evidence at the trial, not here relevant.[3] *Morsey did not contend that the trial court's procedure denied him a jury trial on any issue so triable.* (RA7).

The Circuit Court affirmed the judgment, without a written opinion, under Fifth Circuit Local Rule 21.[4] (PA 33).

On Petition for Rehearing, Morsey asserted, for the first time, that the District Court's determination that it did not have subject matter jurisdiction over the federal security claims deprived him of a jury trial "on the merits." The Fifth Circuit denied the Petition for Rehearing without opinion. (PA 34).

Statement of the Facts

As in the Fifth Circuit, Morsey complains of the District Court's fact findings but does not refer to the facts developed by the evidence. (EVH). Morsey likewise avoids the evidence at

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3/ The issues as presented to the Circuit Court by Morsey's Brief and Reply Brief, are appended hereto. (RA 7). Dismissal of state law security claims was not appealed.

4/ When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See *N.L.R.B. V. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

trial,[5] upon which the court *reaffirmed* its earlier interlocutory ruling. (RA 2).

Having met earlier (R. Vol. 8, pp. 95, 194; EVH 5), Green telephoned Morsey in New York City and offered him the opportunity to purchase an interest in 1600 acres of land near Orlando, Florida, known as the Magnolia Ranch. (EVH 5-6, PX 1; R. Vol. 8, p. 96; PA 28). Green sent Morsey a handwritten letter, (RA 8) outlining the purchase, including a planned resale of the property within a year at an appreciated value. ("EX B," to Second Amended Complaint; PA 29; EVH 8-9, PX 2; R. Vol. 8, pp. 102-103). The property had existing income producing assets that could possibly be used to partially offset mortgage payment obligations and other expenses which might be incurred by the purchasers of the property. (EVH 7, 10, 12, 36, PX 1; R. Vol. 8, pp. 98, 122, 209-210; PA 29; RA 8). These were an existing cattle lease, citrus groves, and a hunting lease. (EVH PX 2, R. Vol. 8, p. 210).

In response to the letter, Morsey sent Green a check for $250,000.00 as his 20% share of the downpayment to purchase the property. (EVH 6-7, 43). The other five purchasers, including Green (10% interest), supplied their proportionate amounts necessary for the down payment. (PX 32).

The purchase was accomplished from the owners (Terry Cattle Company) through The Heminway Corporation, (EVH 46-47, 61-62, DX 1-6; R. Vol. 8, p. 211; R. Vol. 9, p. 268). Title was taken in the name of Heminway to protect the identity of various participants, and to limit personal liability in the purchase. (R. Vol. 8, p. 196; R. Vol. 9, p. 268). Heminway and Terry entered into a Management Services Contract (for successive 6 month periods, cancellable on 60 days notice) which provided that the existing ranch operations would continue,

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5/ At trial, Morsey's evidence (Morsey's testimony and documents) concerning the representations which led him to make the purchase was presented first, as a foundation for another witness (R. Vol. 8, pp. 90-92, 93-145). This evidence was presented separately from the alleged fraud and breaches of fiduciary duty.

and Heminway would pay the expenses of its operations. (DX 4; R. Vol. 9, pp. 384-385, 438).

After the purchase, title to the property was transferred to the Bank; the Management Services Contract and the various mortgage obligations were assigned to the Bank. (EVH DX 9, 32; R. Vol. 9, p. 383). Concurrently, a Trust Agreement (RA 9-16) was executed between the purchasers and the Bank as Trustee (EVH 46-47, DX 2; DX 3). This was the first time the Bank knew Morsey or the Magnolia Ranch even existed. (R. Vol. 8, p. 143-144; R. Vol. 9, p. 349, 352, 376-377, 387, 389-390).

The Trust Agreement set forth the basis of the initial transaction, the obligations of the parties, and the percentage interest of each participant. (DX 3; EVH DX 2). The Trust Agreement did not impose or require any discretionary managerial duties by the Bank as Trustee, with respect to the Magnolia Ranch. The agreement recited, among other things, (DX 3; EVH PX 2; RA 9-16):

—That it was between the participants in the purchase of the real estate, as beneficiaries, and the Bank, as Trustee.

—That the Trustee had taken title "in its name, but for the beneficiaries," to the described real estate.

—The purchase price of the real estate.

—That the Trustee's predecessor in title, Heminway, had paid the purchase price.

—The portion of the purchase price represented by the mortgages.

—That percentage of cash paid at closing by each participant.

—That the "ownership of [the real estate] by said Beneficiaries is in the proportions [sic] to the amount of money paid by them." [Gordon, 40%; Morsey, 20%; Heftler, 10%; Wilmot, 10%; Rubloff, 10%; Green, 10%].

—That the Beneficiaries agreed title was to be taken by the Trustee "for the purpose of making the sale of said property easier and with less expense of recording."

—That "title to said property is to be held by the Trustee for the purposes of facilitating the handling of income, if any, and the expenses of said property by placing control of same in its hands."

—The Agreement and Trust "may be terminated at any time by the unanimous request of the Beneficiaries. . . ."

—That this was a "joint venture of the parties, with each party being liable for his portion of any liability incurred or tax incurred."

The Trust Agreement also provided (RA 11):

> That in transacting any business relative to the property, especially in selling the same and in determining the terms under which the sale of said property will be made, the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with their percentage of ownership, and all parties hereto shall be bound and controlled by such decision.

* * *

Thus, Morsey had the right of substantial pro rata control over the operation of the businesses, and any decisions on sale. (PA 29). Throughout, Morsey took the position that the Trust Agreement and the Heminway purchase documents were not relevant to the security issue. (EVH 60-64).

In operation, the Bank notified the individual beneficiaries

of their payment obligations, according to their percentage interest, and upon receipt of such funds, made payments upon the mortgages. (R. Vol. 10, pp. 540-541). In addition, the Bank, from time to time, received requests for payment of other expenses which would be collected and paid in the same manner. Each year, the Trustee provided beneficiaries with a statement of account reflecting all transactions affecting the Trust. (DX 5; R. Vol. 9, pp. 440-441).

Both at the evidentiary hearing, and later at the trial, Morsey testified that the reason he participated in the purchase of the property was the profit he expected upon its sale. (EVH 28, 45; R. Vol. 9, p. 456). E.g.,:

> Q Why did you make the investment?
>
> A I made the investment because we were going to buy the property at a sacrifice of $750.00 and sell it within 6 months to a year for $1150.00. And my share of that profit would have been a million three hundred thousand dollars. (R. Vol. 9, p. 456).

The total purchase price of the property was approximately $12,000.00 or $750.00 per acre, encumbered by various mortgages and the purchase was made with only a 10% cash down payment. (RA 8). The letter which Morsey relied upon (RA 8) stated that there was $170,000.00 of existing income from existing hunting and cattle leases and groves. The first mortgage was payable at a rate of $75,000.00 per quarter or $300,000.00 a year (of which Morsey's 20% share would be $60,000.00). (RA 9). There existed a second mortgage of $6,850,000.00 with interest only payable until the end of the third year at 7%. Morsey's 20% share of the interest would have been $95,900.00 per year. Green's letter stated: "My plan is to sell in less than one year's time for about 1150 per acre." (RA 8).

In 1974-1975, the real estate market in the State of Florida suffered a severe recession. (R. Vol. 10, p. 673). As a result of

this, and the structure of the mortgage payments, once interest *and* principal payments became due, the beneficiaries began to default. (R. Vol. 10, p. 741). After default, Morsey filed his suit.

In May of 1976 the Bank resigned as Trustee and issued a trustee's deed conveying the property to the participants as tenants in common, according to the interest of each, pursuant to the terms recited in the Trust Agreement. (R. Vol. 9, pp. 528-529). At trial Morsey testified that he exercised his power of control by negotiating an agreement with the former owners, his co-beneficiaries/tenants, and a third party for a contract of sale of the property. (R. Vol. 9, p. 472).

SUMMARY OF ARGUMENT

I

The District Court has discretion to take evidence at a preliminary hearing in order to resolve questions of fact with regard to its subject matter jurisdiction. Even where a jury trial is demanded, subject matter jurisdiction is ultimately a question for the court. Here, the District Court on two occasions did nothing more than determine that subject matter jurisdiction did not present a jury issue.

II

Morsey did not object to the District Court's procedure, nor did he contend in the Circuit Court that he had been improperly denied a jury trial. Morsey attempted to raise this issue only on Petition for Rehearing in the Circuit Court.

The United States Courts of Appeals are not to be utilized as mere way stops on the road to the Supreme Court. Neither should this Court exist as a superior trial and appellate court for resolution of issues waived in lower courts by failure to properly and timely assert them.

III

On the "economic realities," the District Court determined, on two occasions, that Morsey did not purchase a security, and was affirmed without opinion. This Court should not be used as another court of appeal on factual disputes. Morsey purchased an interest in land, admitting that he expected his "profit" to come from its resale at an appreciated value. There was no plan by the purchasers to develop the property.

As a beneficiary/co-tenant under the Trust, Morsey had pro rata control over the sale of the property and its commercial activities, and exercised this power. Nevertheless, the commercial activities were too insubstantial to bring the transaction within the Securities Acts.

ARGUMENT

I

MORSEY WAS NOT IMPROPERLY DENIED A JURY TRIAL. THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THAT NO ISSUE EXISTED FOR THE JURY.

There was no improper "preemption" of a proper "jury" issue by the trial court's pretrial decision and determination of its jurisdiction over federal securities claims. A district court may consider evidence at a preliminary hearing and resolve questions of fact with regard to its jurisdiction, including federal questions.[6] Although the District Court, in its discretion, may submit fact questions to the jury, the issue of its jurisdiction is ultimately for the court's determination, even where evidence may be disputed.[7] Where the court exercises the dis-

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6/ E.g., *Gibbs v. Buck*, 307 U.S. 66 (1939); *State of Alabama ex rel Baxley v. Woody*, 473 F.2d 10, 12 (5th Cir. 1973); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972); 5 Wright & Miller, Federal Practice and Procedure, §1373, at pp. 714-715 (1969); 4 Moore, Federal Practice, §26.56 [6], at p. 26-190 (1977).

7/ E.g., *Gough v. Rossmoor Corporation*, 487 F.2d 373 (9th Cir. 1973).

cretion to determine its jurisdiction prior to trial on the merits, the plaintiff, as here, is required to establish the court's jurisdiction, and he must establish the jurisdictional facts by preponderance of the evidence just as he would have to at trial.[8]

Morsey made no objection to this procedure in the District Court, nor did he raise the issue in the Circuit Court until his Petition for Rehearing, *after* that court had determined, under its Local Rule 21,[9] that there was no error in law or fact which warranted a written opinion. The Circuit Court rightly denied his petition.

None of the numerous cases cited by Morsey in his Petition pass upon or concern his belated claim of right to a jury trial to determine the court's jurisdiction. Certainly, the criminal cases[10] cited by Morsey as an "inference" of this "right" are not dispositive of the District Court's duty and right to determine its jurisdiction in a civil case, or whether there was an abuse of discretion here.

Morsey's selective quotation of language out of this Court's opinion in *SEC V. Joiner Leasing Corp.*, 320 U.S. 344 (1943), lends no support to his argument that he was denied a jury trial. *Joiner* involved the application of facts, after trial, to the Act's definition of a security. The question of a right to a jury trial was not raised. It is interesting that this Court, in *Joiner*, held that the totality of the circumstances must be considered. Here, the trial court did that on two occasions, first at the evidentiary pretrial hearing, and *reaffirmed* that decision (RA 2) on the facts presented at the subsequent jury trial.[11] Morsey simply failed in his proof.

8/ *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Data Disk, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285, n. 2 (9th Cir. 1977).

9/ Note 4, *supra*, p. 3.

10/ *Roe v. United States*, 287 F.2d 435 (5th Cir. 1961); *Tarvestad v. United States*, 418 F.2d 1043 (8th Cir. 1969), *cert. den.* 397 U.S. 935 (1970).

11/ A court may reconsider its interlocutory ruling at any time. E.g., *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir. 1945).

Morsey's argument that the trial court could deny him a jury trial only under standards applicable to summary judgments or directed verdicts fails to understand that the District Court, in effect, did so out of an abundance of caution. (RA 2). Clearly, had the issue been "tried" with a view to submitting it to the jury, the District Court would have been compelled to direct a verdict. As evidenced by the decision in *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252 (9th Cir. 1976), to argue about whether the District Court's action is to be viewed as a summary judgment or a directed verdict is to argue form only. In *Kotz* the District Court considered matters extraneous to the pleadings on motion to dismiss, and the Circuit Court chose to treat the matter as a summary judgment proceeding. As noted in *Kotz*, 532 F.2d at 1255, while in *some* circumstances it may be *appropriate* to submit the matter to the jury, the question is nonetheless whether a material jury question really exists,[12] and this is ultimately a question of law. In inferentially arguing that the facts did not meet the test for a summary judgment or directed verdict, Morsey's Petition has simply chosen not to refer, *in any manner*, to the facts developed at the evidentiary hearing and reasserted at trial. (*Supra*, p. 4, n. 5).

II

MORSEY DID NOT OBJECT TO THE DISTRICT COURT'S DETERMINATION OF ITS OWN JURISDICTION, AND DID NOT PROPERLY OR TIMELY RAISE ANY SUCH ISSUE IN THE CIRCUIT COURT. THIS COURT SHOULD NOT ENTERTAIN ISSUES WHICH HAVE NOT BEEN PROPERLY RAISED BELOW.

12/ However, it is clear to us that in appropriate circumstances a properly instructed jury can determine whether as a matter of fact a disputed instrument is or is not a 'security.' *SEC v. Joiner Leasing Corp.*, 320 U.S. 344, 351, 355, 64 S.Ct. 120, 123, 125, 88 L.Ed. 88, 93, 95 (1943); *Tarvestad v. United States*, 418 F.2d 1043, 1048 (8th Cir. 1969).

The District Court essentially determined, after viewing all of the other relevant facts, that no jury question was presented with respect to the nature of the Artko note. It is this determination which we review. [532 F.2d at 1255].

While Morsey presents no basis whatsoever for the exercise of this Court's discretionary review, this Court has often stated that it will not review legal issues which were not properly presented in the lower courts, or which were not even raised, including claims of a denial of a "constitutional right."[13]

Here, not only did Morsey not object to the procedure in the District Court, he failed to raise the issue on direct appeal to the Circuit Court, in favor of a belated after-the-fact attempt upon rehearing. Thus, even if the procedure was erroneous, which it was not, Morsey waived his right to claim error.[14] To hold otherwise would simply allow litigants to ignore their duties to the lower courts, and to treat them as way stops to the Supreme Court, thus using this Court as a "superior" *trial* and *appellate* Court.

III

THE MAGNOLIA RANCH WAS NOT A SECURITY

In determining whether a particular transaction is, or is not a "security," substance is exalted over form, and emphasis is placed on the "economic realty" of the total situation.[15]

13/ *Husty v. United States*, 282 U.S. 694, 701-702 (1930); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163, 164 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1926) (constitutional issue not asserted below):

> This Court sits as a court of review. It is only in exceptional cases coming here from the Federal Courts that questions not pressed or passed upon below are reviewed.

14/ *Jamestown Farmers Elevator, Inc. v. General Mills*, 552 F.2d 1285 (8th Cir. 1977); *Stephens v. Arrow Lumber Co.*, 354 F.2d 732 (9th Cir. 1966); *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir. 1974); especially, *National Family Ins. Co. v. Exchange National Bank of Chicago*, 474 F.2d 237, 241 (7th Cir. 1973), *cert. den.* 414 U.S. 825 (1973); *Southland Reship, Inc. v. Flegel*, 534 F.2d 639 (5th Cir. 1976).

15/ *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *SEC v. Joiner, supra, McGovern Plaza Joint Venture v. First of Denver*, 562 F.2d 645 (10th Cir. 1977); See, *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. den.* 391 U.S. 905 (1967).

In *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), this Court defined an investment contract, in general terms, as a transaction or scheme whereby (1) a person invests his money (2) in a common enterprise and (3) is led to expect profits (4) solely from the efforts of the promoter or a third party. *Howey*, 328 U.S. at 298-299. The citrus grove "units" and "management contracts" in *Howey* bear no relationship to the Magnolia Ranch purchase. However, as to the citrus groves in *Howey*, this Court stated:

> Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area. A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments. The respective shares in this enterprise are evidenced by land sales contracts and warranty deeds which serve as a convenient method of determining the investors' allocable shares of the profits. The resulting transfer of rights in land is purely incidental. Thus, all the elements of a profit seeking venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. [328 U.S. at 300].
>
> * * *
>
> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.
>
> [328 U.S. at 301].

In returning to *Howey* and the economic reality test, this Court, in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975), stated:

> . . .the basic test for distinguishing the transaction from other commercial dealings is 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the

> efforts of others.' Howey, 328 U.S. at 301, 90 L.Ed. 1244, 66 S.Ct. 1100, 163 ALR 1043. This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant capital appreciation resulting from the development of the initial investment, as in Joiner, supra (sale of oil leases conditioned on promoters agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in Tcherepnin v. Knight, supra, (dividends on the investment based on savings and loan association's profits).

Whether or not the word *solely* is to be given a broad or narrow definition,[16] Morsey's purchase of an undivided 20% interest, with pro rata right of control, (RA 11) in the hope of a quick resale at a substantial profit, and with the possibility that income presently existing from groves and leasing pasture to cattle owners and hunting rights would partially offset his payments for the land, did not constitute a security.[17]

None of the cases cited by Morsey in reliance upon his assertions are factually or legally applicable to the Magnolia Ranch situation, especially when viewed from the standpoint of "economic realities." There is simply no factual basis to support the argumentative contention that Morsey invested in the "managerial efforts of Green," without regard to the inherent value of the property. Both the documentary evidence and Morsey's own testimony (*supra*, p. 7) are to the contrary. The letter upon which Morsey relied (RA 8) specifically stated: "My plan is to sell in less than one year's time for about 1150 per acre." Under the trust agreement (DX 3; EVH PX 2, *supra*, p. 6)

16/ See *Forman*, 328 U.S. at 852, n. 16.

17/ *Howey, supra; Forman, supra; Joiner, supra; Commanders Palace Park v. Girard and Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978); *Continental Marketing Corp. v. SEC*, 387 F.2d 466 (10th Cir. 1967), *cert. den.*, 391 U.S. 905 (1967); *Oxford Finance Companies, Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974); *Van Arsdale v. Claxton*, 391 F.Supp. 538 (S.D. Cal. 1975).

Morsey had pro rata control both as to the "businesses" and the sale of the property, a right he exercised. The property was physically operated on behalf of the beneficiaries, by the Terry Cattle Company, under its Management Services Contract, previously assigned to the Bank, as Trustee for the beneficiaries under their sole right of control[18] under the Trust. (RA 11).

The existence of the income represented only the possibility of a small offset on the mortgage payment obligations and other expenses incurred by the purchasers of the property. (PA 29; RA 8). As Morsey himself testified, he purchased the property in hope of a *profit* from its *resale* and he was looking to the so-called "income streams" only as ". . . some kind of protection on the down side," and because of the inherent value ". . . I felt that our profit was in hand." (EVH 28).

Morsey's 20% share of the $170,000.00 income which was anticipated at the time he purchased his interest would amount to $34,000.00 per year. Not counting his share of the taxes, or other expenses of the property, Green's letter (RA 8) would have informed even a neophite[19] investor that his share of the interest payments *alone* would be $95,900.00 a year on the second mortgage, and he would be obligated to pay $60,000.00 per year on the first mortgage, for a total yearly payment in excess of $150,000.00. After principal payments on the $6,850,-000.00 became due (eight equal annual payments) his obligations would significantly increase. Even without his testimony that he looked to the *sale* of the land for his profit, it is ludicrous to assert that this income represented a *reasonable expectation* of "profit," relied upon by Morsey, regardless of his right of control. This is especially true where all concerned looked for a

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18/ See e.g., *Commanders Palace Park v. Girard and Pastel Corp.*, 572 F.2d 1084 (5th Cir. 1978); *Hirsh v. du Pont*, 396 F.Supp. 1214 (S.D. N.Y. 1975), *affirmed*, 533 F.2d 750 (2nd Cir. 1977).

19/ Morsey was at the time Executive Vice President of Finance and Planning for the R.C.A. Corporation of New York City, and a sophisticated investor, (EVH 33) with a net worth of $2,900,000.00 (R. Vol. 8, p. 133; R. Vol. 9, pp. 302-303, 306-307; 526-528).

quick sale within a year. No representations that the property could or would be *held* for any *income* potential were made to Morsey by Green. (RA 8). This income is no different in character, under the economic reality test, than the income derived from the leasing, by Co-Op City, of commercial facilities in *Forman*, 421 U.S. at 855:

> The income, if any, from these conveniences all located within common areas of the housing project, is to be used to reduce tenant rental costs. Conceptionally, one might readily agree that net income from the leasing of commercial and professional facilities is the kind of profit traditionally associated with a security investment. See Tcherepnin v. Knight, supra. But in the present case this income - if indeed there is any - is far too speculative and insubstantial to bring the transaction within the Securities Acts.

Morsey's Petition admits that he did not purchase the property upon any representations by Green that it would be developed. As stated by this Court in *Forman*, 421 U.S. at 852:

> By profits the Court has meant either capital appreciation resulting from the development of the initial investment, as in Joiner, . . . or a participation in earnings resulting from the use of investors funds, as in Tcherepnin v. Knight . . .

Morsey's investment in Magnolia Ranch meets neither criteria, regardless of his right of pro rata control.

Here, the "economic reality" of this transaction was that Morsey purchased property with the expectation that he would "profit" when the land was sold at what was hoped to be a substantially higher price. The power to control the property, its insignificant income producing activities, and most important, its ultimate resale to realize the *"profit" he expected*, was solely in his hands and that of the other beneficiaries.[20]

20/ E.g., *Schultz v. Dain*, 568 F.2d 612 (8th Cir. 1978); *Fargo Partners v. Dain Corp.*, 540 F.2d 912 (8th Cir. 1976); *Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666, 670 (10th Cir. 1972); *Van Arsdale v. Claxton*, 391 F.Supp. 538 (S.D. Cal. 1975); *Hirsh v. du Pont*, 396 F.Supp. 1214 (S.D. N.Y. 1975), affirmed, 533 F.2d 750 (2nd Cir. 1977).

This is not a *Howey* situation where the only way the investors could hope for any return on their investment was upon their absolute reliance of the ability of the promoter/seller, over whom they had no control. This is not a *Joiner* situation where "the economic realities" were based upon "...the proposed and promised exploration well..." by the sellers, (*Joiner*, 320 U.S. 344, 348), which provided the investment with "...most of their value and all of their lure." Id., at 349. *See also, Forman*, 421 U.S. 837, 853, n. 18.

As found by the District Court, (EVH) and as reaffirmed by the District Court following presentation of the same and more evidence at trial, (RA 2), which was affirmed by the Fifth Circuit:

> Morsey's investment involvement with a joint venture with the expectation he would profit from a rise in the value of the property upon his decision and that of the other beneficiaries to sell or the expectation of profits from ongoing business of which he had substantial control did not constitute the acquisition or sale of a security under Federal law. *VanArsdale v. Claxton*, 391 F.Supp. 538. (S.D. Cal. 1975); *Oxford Financial Corp., Inc. v. Harvey*, 385 F.Supp. 431 (E.D. Pa. 1974). (PA 31-32).

Morsey's Petition presents arguments and assertions in a factual vacuum, obviously in hope that this Court will retry facts on an issue twice determined in the District Court, appealed to the Circuit Court, and affirmed under circumstances where that Court felt that an opinion would have no precedential value. This Court should, as it has done in the past, continue to refuse to become a Court of select errors to be utilized by litigants for correction of asserted fact finding errors.[21]

21/ *Graver Mfg. Co. v. Lindi Air Products Co.*, 336 U.S. 271, 275 (1948); *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508 (1923).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(813) 223-2411
ATTORNEYS FOR RESPONDENT
FIRST NATIONAL BANK
IN PALM BEACH

of Counsel, JOHN F. RUDY, II

CASE NO. 80-200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CHASE MORSEY, JR.,

Petitioner,

vs.

ELMER G. GREEN and FIRST NATIONAL BANK IN PALM BEACH,

Respondents.

APPENDIX TO BRIEF FOR RESPONDENT, FIRST NATIONAL BANK IN PALM BEACH, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

ORDER DENYING MOTION THAT THE COURT AMEND ITS ORDER OF MARCH 23, 1977, TO CERTIFY IT IS APPEALABLE

THIS CAUSE having come before the Court on motion of plaintiff that the Court amend its Order of March 23, 1977, to certify it is appealable, and the Court having considered the record in this cause, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that said motion is DENIED.

DONE AND ORDERED at Miami, Florida, this 7th day of April, 1977.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

DISTRICT COURT'S REAFFIRMATION OF PRIOR DETERMINATION THAT A SECURITY WAS NOT INVOLVED (R. Vol. 10, pp. 654-655)

THE COURT: I think that we have covered all of the exhibits. I think that before the jury comes back I should make one further announcement.

I ruled earlier in this case after an evidentiary hearing that the primary purpose of plaintiff's purchase of an interest in the Magnolia Ranch property was for resale of the land within a year at an increased price and not for development. The income from the grove and the leases were to be used to offset interest payments, thus my finding was that the anticipated increments in the value of the land was the basis for investment and not an expectation of profits from the income-producing operations of the property itself. As such this scheme was not a Section 21 investment contract as defined by the United States and Florida Supreme Court decisions. Hence, the federal securities laws and the Florida Blue Sky laws are inapplicable to the facts in this case. Accordingly, in light of all of the relevant evidence gathered in this cause and now further confirmed at this trial, I hereby reaffirm my decision to dismiss all claims under the Federal and Florida securities laws.

MR. RUDY: Thank you very much, Your Honor.

THE COURT: I do call attention to counsel of the decision of Oil & Gas Income, Inc. vs. Woods Exploration & Producting Co., Inc., 362 F.2d 309 [sic. 365 F.2d 309], a Fifth Circuit decision, making reference to the pertinent portions of 15 U.S. Code Section 77K(3), permitting an award of attorneys fees to a litigant where the suit or defense, as it may be, was without merit.

Bring the jury in.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. WPB 76-8044-Civ-CA

SPECIAL VERDICT FORM
UNDER RULE 49(a), Fed.R.Civ.P.

WE, THE JURY, MAKE THE FOLLOWING FINDINGS OF FACT IN THE FORM OF ANSWERS TO THE QUESTIONS BELOW:

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

AS TO DEFENDANT ELMER G. GREEN:

1. (a) Did the defendant Elmer G. Green make a misrepresentation or omission of material fact to the plaintiff Chase Morsey, Jr.?

Yes_____ No X

If your answer to Question No. 1(a) is "No," go on to Question No. "2" and do not answer 1(b), 1(c), and 1(d).

If your answer to Question No. 1(a) is "Yes," then answer 1(b), 1(c), and 1(d).

(b) Was such misrepresentation or omission of material fact made by defendant Elmer G. Green with knowledge that the statement was false, or under circumstances in which defendant Elmer G. Green should have known, if he did not know, of the falsity of it?

Yes_____ No_____

(c) Was such misrepresentation or omission made with the intent to induce the plaintiff Chase Morsey, Jr. to purchase the Magnolia Ranch property?

Yes_____ No_____

(d) What amount of damages, if any, to plaintiff

Chase Morsey, Jr. resulted from such misrepresentation or omission?

$_____

2. (a) Did defendant Elmer G. Green breach a fiduciary duty to plaintiff Chase Morsey?

Yes_____ No X

If your answer to Question No. 2(a) is "No," go on to Question No. "3" and do not answer 2(b).

If your answer to Question No. 2(a) is "Yes," then answer 2(b).

(b) What amount of damages, if any, to the plaintiff Chase Morsey, Jr. resulted from such breach of fiduciary duty?

$_____

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

AS TO DEFENDANT FIRST NATIONAL BANK OF PALM BEACH:

3. (a) Did defendant First National Bank make a misrepresentation or omission of material fact to the plaintiff?

Yes_____ No X

If your answer to Question No. 3(a) is "No," go on to Question No. 4 and do not answer 3(b), 3(c), and 3(d).

If your answer to Question No. 3(a) is "Yes," then answer 3(b), 3(c), and 3(d).

(b) Was such misrepresentation or omission of material fact made by defendant First National Bank with knowledge that the statement was false, or under circumstances in which defendant First National Bank should have known, if he did not know, of the falsity of it?

Yes_____ No_____

(c) Was such misrepresentation or omission made with the intent to induce the plaintiff Chase Morsey, Jr. to purchase the Magnolia Ranch property?

Yes_____ No_____

(d) What amount of damages, if any, to plaintiff Chase Morsey, Jr. resulted from such misrepresentation or omission?

$_____

4. (a) Did defendant First National Bank breach a fiduciary duty to plaintiff Chase Morsey?

Yes_____ No X

If your answer to Question No. 4(a) is "No," go on to Question No. 5 and do not answer 4(b), 4(c), 4(d), 4(e), and 4(f).

If your answer to Question No. 4(a) is "Yes," then answer 4(b), 4(c), 4(d), 4(e), and 4(f).

(b) What amount of damages, if any, to the plaintiff Chase Morsey, Jr. resulted from such breach of fiduciary duty?

$_____

(c) Do you find as a matter of fact that with respect to the year 1973 of the trust, plaintiff Morsey received an account or other statement fully disclosing matters affecting the trust then within the bank's knowledge?

Yes_____ No_____

(d) If your answer to the above question is "Yes," please answer whether you find as a fact that Morsey failed to assert a claim within six (6) months after receipt of such account or statement.

Yes_____ No_____

(e) Do you find as a matter of fact that with respect

to the year 1974 of the trust, plaintiff Morsey received an account or other statement fully disclosing matters affecting the trust then within the bank's knowledge?

Yes_____ No_____

(f) If your answer to the above question is "Yes," please answer whether you find as a fact that Morsey failed to assert a claim within six (6) months after receipt of such account or statement.

Yes_____ No_____

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

SO SAY WE ALL.

/s/ Charin
FOREPERSON

DATED THIS 21st DAY OF MARCH, 1978.

ISSUES AND ASSERTIONS OUTLINED IN MORSEY'S BRIEF AND REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. THE PARTICIPATION MORSEY PURCHASED FROM GREEN IS A SECURITY.

   A. Morsey Invested in A Common Enterprise with The Expectation of Profit from The Essential Managerial Efforts of Green.

   B. The District Court Erred in Failing to Look beyond The Written Trust Agreement.

   C. The District Court Erred in Holding That The Expectation of Income And The Expectation of Profit from Green's Sale of The Magnolia Ranch Did Not Make The Securities Laws Applicable.

   D. The Howey Test Applies to Real Estate The Same As Any Other Asset.

II. THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY ON FLORIDA STATUTES § 475.25.

III. THE DISTRICT COURT DENIED MORSEY A FAIR TRIAL.

GREEN LETTER TO MORSEY EX. B TO COMPLAINT

Sat. Morning

Dear Chase:

Enclosed please find a map of the Orlando area plus some facts concerning the purchase of Magnolia Ranch —

Total acreage 15,876 acres

Price per acre — 755.00

Total price — approx. $12,000,000

1st mtg. — 3,950,000 Federal Land Bank

2nd mtg. — 6,850,000

Cash — 1,200,000

1st mtg. payable $75,000 per quarter

this includes interest, 2nd mtg. interest payable only 7% until the end of the 3rd year. Then 8 equal annual payments.

Property is less than 10 minutes from the Orlando Airport. Less than 20 minutes from Orlando. There are two diamond interchanges located on the property — providing access to the expressway —

There are 700 acres of groves — producing about a $60,000 net profit — a hunting lease at $30,000 per annum & a cattle lease producing about $80,000 per year.

My plan is to sell in less than one year's time for about 1150 per acre.

Please call me on Tuesday if you need further information.

Best regards,
/s/ Ed

TRUST AGREEMENT

THIS AGREEMENT made and entered into as of June 20, 1973, by and between EDWIN F. GORDON, CHASE MORSEY, JR., PIERRE V. HEFTLER, AS TRUSTEE, MOLLIE WILMOT, ARTHUR RUBLOFF and E. G. GREEN, parties of the first part, hereinafter known as "Beneficiaries", and FIRST NATIONAL BANK IN PALM BEACH, 255 South County Road, Palm Beach, Florida, a banking corporation organized and existing under the laws of the United States of America, party of the second part, hereinafter referred to as "Trustee".

WITNESSETH:

WHEREAS, on June 19, 1973, the Trustee did take title in its name, but for the Beneficiaries, to the following described real property lying and being in the County of Orange, State of Florida:

SEE DESCRIPTION ATTACHED

and

WHEREAS, the total purchase price paid for said property by the Trustee's predecessor in title (THE HEMINWAY CORPORATION), was $12,316,780.78, which includes $200,000.00 stock in the Federal Land Bank and purchase of an existing escrow account with said bank. Of said sum, $7,152,549.12 was represented by a purchase money second mortgage and $3,965,547.66 by assumption of an existing mortgage; and

WHEREAS, the amount of cash required to close this transaction, and closing costs, were furnished by the Beneficiaries in the following percentages:

EDWIN F. GORDON	40%
CHASE MORSEY, JR.	20%
PIERRE V. HEFTLER, AS TRUSTEE	10%
MOLLIE WILMOT	10%
ARTHUR RUBLOFF	10%

E. G. GREEN	10%

and,

WHEREAS, the ownership of said property by said Beneficiaries is in the proportions to the amounts of money paid by them and in the percentages recited above; and

WHEREAS, the Beneficiaries have agreed that the title as taken be held by the Trustee for the purpose of making the sale of said property easier and with less expense of recording so that a purchaser of said property would not be required to examine many documents to determine the authority of the record owner to sell said property; and

WHEREAS, the title to said property is to be held by the Trustee for the purpose of facilitating the handling of the income, if any, and the expenses of said property by placing the control of same in its hands; and

WHEREAS, the Trustee has agreed to hold the title to said property in its name, holding it in trust for the Beneficiaries in their above outlined respective percentages and under the terms of this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants of the parties to this agreement, it is agreed as follows:

1. That the Trustee shall hold said property in trust for the Beneficiaries in the following percentages:

EDWIN F. GORDON	40%
CHASE MORSEY, JR.	20%
PIERRE V. HEFTLER, AS TRUSTEE	10%
MOLLIE WILMOT	10%
ARTHUR RUBLOFF	10%
E. G. GREEN	10%

2. That in transacting any business relative to the property, especially in selling the same and determining the terms under which the sale of said property will be made, the Trustee shall be governed and controlled by a majority consent of the Beneficiaries in accordance with their percentage of ownership, and all parties hereto shall be bound and controlled ' y such decision. When a bona fide offer is received and a majority agree to accept said offer, any or all of the minority shall have the right to retain ownership of the property by purchasing the interest of the majority on the same terms and conditions as the offer.

3. That the Trustee shall, in conveying said property, or otherwise dealing with same in accordance with the directions of the Beneficiaries pursuant to the terms of paragraph 2 hereinabove, convey, lease or let contracts on said property as if it were the individual owner thereof, and under such circumstances the proceeds from same shall be available to the Beneficiaries, subject to the terms and conditions hereinafter set forth; and said Beneficiaries shall have no right to proceed against any third person or persons dealing with the Trustee to recover any losses sustained by reason of the acts of the Trustee so long as said third person or persons shall be a bona fide purchaser, lessee or contractor upon said property.

4. That the Beneficiaries do understand and agree that the property will have certain expenses by reason of principal and interest expenses due on the purchase money mortgage, public liability insurance, and by reason of the taxes that may be assessed against the property by the proper taxing authorities. It is understood and agreed that when the time for the payment of such expenses comes due, the Trustee shall notify the Beneficiaries of their pro rata share of the indebtedness at least thirty (30) days prior to the maturity date. (For the purpose of this agreement, the maturity date of all taxes shall be November 30 of each year). Within twenty (20) days from the receipt of said notice, the Beneficiaries will deliver to the Trustee the amount due. No beneficiary shall have any personal liability hereunder and recourse against a Beneficiary shall be limited to his interest in the property.

If the Trustee shall pay or incur any liability to pay any money on account of this trust or incur any liability to pay any money on account of being made a party to any litigation as a

result of holding title to the trust property or otherwise in connection with this trust, whether because of breach of contract, injury to person or property, fines or penalties under any law or otherwise, the Beneficiaries jointly and severally agree that on demand they will pay to the Trustee with interest at the rate of six per cent per annum, all such payments made or liabilities incurred by the Trustee, together with its expenses including reasonable attorney's fees, and that they will indemnify and hold the Trustee harmless of and from any and all payments made or liabilities incurred by it for any reason whatsoever as a result of this agreement; and all such amounts so paid by the Trustee, as well as its compensation under this agreement, shall constitute a lien on the trust property. The Trustee shall not be required to convey or otherwise deal with the trust property so long as any money is due to the Trustee under this agreement; nor shall the Trustee be required to advance or pay out any money on account of this trust or to prosecute or defend any legal proceeding involving this trust or any property or interest under this agreement unless it shall be furnished with sufficient funds or be indemnified to its satisfaction.

5. For the purpose of this agreement, it is understood that the Trustee will be compensated at the rate of 1/10th of 1% of the original purchase price paid by the Trustee for the property, payable annually, with the first payment being due one (1) year from the date of this agreement.

In the event the property is sold within one year from the date of this agreement, then, and in that event, the Trustee will be entitled to the entire yearly fee; however, in the event the property is sold during any year after the first year, then, and in that event, the Trustee will receive only that portion of the fee for the year that has passed.

6. This agreement and trust may be terminated at any time upon the unanimous request of the Beneficiaries, but in no event shall run for a period of more than twenty-one years from the date hereof.

In the event of such termination, the Trustee will convey the property to whatsoever person or persons the Beneficiaries shall unanimously designate and all rights and liabilities of the Trustee created hereunder will thereafter be null and void.

In the event the said Beneficiaries shall fail to so designate who shall receive title, then the Trustee shall convey by appropriate deed to the Beneficiaries named herein as tenants in common in the percentages stated hereinabove.

The Trustee may resign at any time by sending a notice of its intention to do so by registered mail to each of the Beneficiaries under this agreement at his address last known to the Trustee.

Such resignation shall become effective twenty days after the mailing of such notices.

In the event of such resignation, a successor, or successors may be appointed by a majority of the beneficial interest, and the Trustee shall convey the trust property to such successor or successors in trust.

If no successor in trust is so named within twenty days after the mailing of such notice, then the Trustee may convey the trust property to the Beneficiaries in accordance with their respective interest, or the Trustee, at its option, may file a suit for appropriate relief in any court of competent jurisdiction.

The Trustee notwithstanding such resignation shall have a lien on the trust property for its costs, expenses and attorneys' fees for its reasonable compensation.

7. It is agreed that in the event the Beneficiaries fail to contribute to the Trustee the funds necessary to meet the expenses hereinabove set forth, and the property therefore becomes in default and subject to foreclosure, the Trustee shall have no obligation or responsibility whatsoever to protect the interest of the Beneficiaries beyond the thirty day notice hereinabove mentioned.

In the event of a default on the part of a Beneficiary hereunder in the payment of any money obligations on his part set forth herein the said Beneficiary shall forfeit his entire interest in this trust. This interest would then be distributed among the remaining Beneficiaries in their proportionate amounts.

8. It is not the intention of the parties hereto in making this agreement to limit the liability of the Beneficiaries and to

impose a greater liability upon the Trustee. It is not the purpose of the parties hereto to avoid the payment of income tax. It is not the purpose of the parties hereto to assume the characteristics of a corporation without complying with the corporation laws of the State of Florida, nor is it the purpose of the Beneficiaries to seek the advantages of a corporation without the corresponding tax disadvantages. This is a joint venture of the parties, with each party being liable for his portion of any liability incurred or tax incurred. The purpose of the parties in making this trust agreement is solely for simplicity of holding title and conveying.

9. The Trustee shall not be required in dealing with the trust property or in otherwise acting under this agreement (a) enter into any individual contract or other individual obligation whatsoever nor (b) to make itself individually liable to pay or incur the payment of any damages, attorneys' fees, fines, penalties, forfeitures, costs, charges, or other sums of money whatsoever. The Trustee shall have no individual liability whatsoever arising from its ownership as Trustee of the legal title to the trust property or in respect to any act done or contract entered into or indebtedness incurred by it in dealing with the trust property or in otherwise acting under this agreement, except only so far as the trust property and any trust funds in the actual possession of the trustee shall be applicable to the payment and discharge of such liability or obligation.

10. This agreement shall not be placed on record in the County in which the trust property is situated or elsewhere; but if it is so recorded, such recording shall not be considered as notice of the rights of any person under this agreement derogatory to the title or powers of the Trustee.

11. It is understood and agreed that any conveyance made by the Trustee involving the real property in question shall be by Trustee's deed without warranty of title.

12. It is understood and agreed that this agreement shall be construed pursuant to the laws of the State of Florida.

13. Where approval and/or consent is to be given by the Beneficiaries to the Trustee, the Trustee is authorized to act upon the written or telegraphic communication wherein Beneficiaries give consent to proposed act of the Trustee by confirm-

ing therein to Trustee the major terms of the proposal, and the Trustee shall thereupon be authorized to act thereon; subject, of course, to the majority consent as set forth in paragraph 2.

14. The terms and conditions of this agreement shall inure to the benefit of and be binding upon any successor trustee under it as well as on the executors, administrators, heirs, assigns and all other successors in interest of the Beneficiaries.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be signed in their names and have hereunto set their hands and seals as of June 20, 1973.

WITNESSES:

_____(SEAL)
EDWIN P. GORDON

_____

_____
As to Edwin P. Gordon

/s/ Chase Morsey, Jr. (SEAL)
CHASE MORSEY, JR.

/s/ Mildred Barr

/s/ Alice R. Tina
As to Chase Morsey, Jr.

_____(SEAL)
PIERRE V. HEFTLER, Trustee

_____

_____
As to Pierre V. Heftler, Trustee

_____(SEAL)
MOLLIE WILMOT

_____

_____
As to Mollie Wilmot

_____(SEAL)
ARTHUR RUBLOFF

_____

_____
As to Arthur Rubloff

_____(SEAL)
E. G. GREEN

_____

_____
As to E. G. Green

BENEFICIARIES

FIRST NATIONAL BANK
IN PALM BEACH

By /s/ Charles A. Penney
Trust Officer
TRUSTEE

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

CASE NO. 80-200

in the

Supreme Court
of the
United States

October Term, 1979

CHASE MORSEY, JR.,

Petitioner,

vs.

ELMER G. GREEN and
FIRST NATIONAL BANK IN PALM BEACH,

Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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Rules

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STATEMENT OF THE CASE[1]

Respondents complain of Morsey's brevity in advising this Court of the facts.[2] Respondents' lengthier statement, however, in fact confirms and corroborates Morsey's own fact summary.

Respondents expand on Morsey's summary selectively, obviously to convince this Court of their version of the disputed facts: (1) the nature of the efforts which Green promised and on which Morsey relied; and (2) Morsey's control over the enterprise. Respondents' fact statement, while accurately taken from the record, is not complete.

Morsey testified that, as an investor, he did not anticipate or exercise any significant control of the enterprise; that the income streams were a material inducement of his investment; and that he relied on Green's representations that Green, using his unique expertise, reputation, and market position, would manage the income streams and effect a quick, profitable resale:

> [Green] told me that none of his investors had ever lost any money. . . . He also said that one of the requirements that he had of his investors was that

---

[1]The abbreviations used in Morsey's Petition will be continued herein. Additionally, Respondent's abbreviation (EVH) for the evidentiary hearing will be used.

[2]The Bank states at p. 3 of its brief:

> As in the Fifth Circuit, Morsey complains of the District Court's fact findings but does not refer to the facts developed by the evidence.

The implication that in the Fifth Circuit Morsey did not discuss the evidence with appropriate record references is simply false.

he would manage the property, that he would handle all of the negotiations for the property, and that he preferred his investors to stay away and not bother him and that he would manage it and operate the ranch and see that we would get the income and he would arrange to sell it.[3]

* * *

He said that he would manage the ranch.[4]

* * *

Mr. Green told me that he was going to manage everything; that he would run the ranch and operate the trust. And I was never consulted at any time by Mr. Green or the bank.[5]

* * *

I did not feel that there had to be any rise in the value of the land. . . . Mr. Green explained to me that we were making a very, very good purchase. He stole the property, is what he said to me, for $755 an acre; that it was worth $1,100 an acre today on today's market. He talked to me about his expertise in part of the negotiations and he sent me a copy of an article from *The Floridian* that stressed his expertise.[6]

---

[3]EVH 10

[4]EVH 16

[5]EVH 18

[6]EVH 27

The record amply supports the fact summary in Morsey's Petition.

ARGUMENT

I

FACT QUESTIONS NECESSARY TO DETERMINE THE EXISTENCE OF A SECURITY ARE FOR THE JURY

Respondents do not even attempt to refute Morsey's contention that fact questions necessary to determine whether a security exists are for the jury. Instead, Respondents state evasively that "the question of whether the relevant facts present a jury question is itself a question of law for the Court."[7]

Here, the district judge's legal determination was necessarily and expressly based on his factual determinations, on disputed evidence: (1) that Morsey shared control of the enterprise, and (2) that the expectation of profit was based on market appreciation rather than on Green's entrepreneurial efforts. There was ample evidence for a jury to find otherwise.

Respondents suggest that no jury trial was required because of the district judge's power to resolve factual disputes to determine subject matter jurisdiction. Respondents studiously ignore, however, the limitations on that power. *See McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 362-363 (5th Cir. 1967):

> However, where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues

[7]Green's brief p. 5. *See* Bank's brief p. 11.

should be deferred to the merits, for it is impossible to decide the one without the other.

The Bank cites *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973), as holding that factual disputes necessary to determine jurisdiction must be resolved by the trial judge. The case holds nothing of the sort. Noting that "the jurisdictional issue under the Sherman Act is distinct from the substantive issue," the court ruled:

> It is doubtful whether the jurisdictional issue should have been submitted to the jury, even had the evidence been in dispute. Except where the jurisdictional issue and the issues on the merits are factually 'completely intermeshed,' *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 362-363 (5th Cir. 1967), it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed.R.Civ.P., rather than the jury's function to resolve such disputes in the trial of the case on the merits.
>
> * * *
>
> In any event, there was no conflict in the evidence as to the facts relevant to jurisdiction. The undisputed facts established that the necessary relationship to interstate commerce did exist. In these circumstances, it was error to submit the jurisdictional issue to the jury under Rule 49(a).

487 F.2d at 375, 377.

Respondents cite *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977), for the argument that a plaintiff is properly required, at a hearing on

a motion to dismiss, to prove the jurisdictional facts "by a preponderance of the evidence." In fact, the court there said that "where the jurisdictional facts are intertwined with the merits," the plaintiff at a preliminary hearing "should be required only to establish a prima facie showing of jurisdictional facts," deferring full proof until trial. 557 F.2d at 1285-1286 n.2.

Ultimately, Respondents are compelled implicitly to concede Morsey's position and argue that the district court "in effect" applied the appropriate standards (i.e., those applicable to summary judgments or directed verdicts) "out of an abundance of caution."[8] The district court plainly did no such thing.[9]

Respondents, being unable to refute Morsey's argument, then seek to avoid it, arguing that Morsey waived his right to a jury trial.

Respondents' argument requires a complete distortion of what happened below.

The district court held that on the face of the complaint, there was no security. Then on Morsey's motion for rehearing, the court received evidence and entered fact findings to attempt to justify its prior dismissal. Morsey's timely jury demand was of record. To say that Morsey, on a rehearing granted in the court's discretion to consider reviving his complaint, was required to verbalize again his jury demand and object to the court's consideration of his rehearing motion defies logic and would require procedural suicide. None of the cases Respondents cite on waiver of jury trial involved a self-substantiating rehearing on a dismissed

[8]Bank's brief, p. 11.

[9]*See* A-28-32; Respondent Bank's Appendix A-2. The judge manifestly did not conclude that the facts were beyond reasonable dispute.

complaint.[10] Morsey was certainly not required to waive his right to a jury trial in order to have the trial judge correct a legally erroneous ruling.

Morsey appealed the district judge's preemptory determination that no security existed. Not once did appellees suggest that any deference was due the trial judge's fact findings. Not until the Fifth Circuit affirmed had there been any suggestion that the district judge's fact findings were reviewable on a "clearly erroneous" standard.[11] Morsey moved for rehearing, arguing that the court had applied the wrong standard to the fact findings — that the fact findings could properly be affirmed only under a summary judgment or a directed verdict standard.

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[10]Respondents' reliance on *Duignan v. United States*, 274 U.S. 195 (1925) is clearly misplaced. There the United States brought a statutory bill in equity to abate a liquor nuisance. The owner of the premises filed a cross bill against the lessee for forfeiture of the lease, which was granted. On the lessee's appeal, this Court held:

> Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed.

Morsey, on the other hand, timely demanded a jury trial.

In *Southland Reship, Inc. v. Flegel*, 534 F.2d 639 (5th Cir. 1976), counsel stated in open court that they "waived their right to a jury trial on liability while retaining their right to a jury on damages." 534 F.2d 644. Morsey expressed no such waiver.

Finally, in *National Family Ins. Co. v. Exchange Nat. Bank of Chicago*, 474 F.2d 237 (7th Cir. 1973), cert. denied, 414 U.S. 825 (1973), a factual hearing was held not on a dismissed complaint, but after a motion to dismiss was treated as one for summary judgment and then denied pending further factual development.

[11]The Fifth Circuit's affirmance cited Local Rule 21:

> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to

Morsey plainly has not waived his right to a jury trial. Morsey's not anticipating an erroneous ruling not even urged by Respondents cannot deprive him of so fundamental a right.

Moreover, even had Morsey failed to make this argument at the first opportunity (which he did not), the argument still would be properly before this Court. *See Carlson v. Green*, ___ U.S. ___, 100 S.Ct. 1468, 1471 n.2 (1980):

> Though we do not normally decide issues not presented below, we are not precluded from doing so.

Vance v. Terrazas, ___ U.S. ___, 100 S.Ct. 540, 544 n.5 (1980):

> Consideration of issues . . . not presented in the Court of Appeals is not beyond our power.

(Footnote 11 Continued)

the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, or (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and the Court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'

See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

New York City Transit Authority v. Beazer, ___ U.S. ___, 99 S.Ct. 1355, 1364 n.24 (1979).

II

WHERE THE PROMOTER PROMISED TO MANAGE INCOME STREAMS AND TO USE HIS EXPERTISE, REPUTATION, AND MARKET POSITION TO SELL THE LAND AT A PROFIT, A PARTICIPATION IN A LAND SYNDICATION IS A SECURITY

Respondents try to avoid the merits of Morsey's securities claim. The Bank argues the facts, saying that Morsey controlled the investment because of the written trust agreement, and that his expectation of profit was based on a rising market. Green says that the district court simply applied "the established definitional tests" to "the economic realities and total circumstances" presented.[12]

Morsey testified that he relied on Green's market position, expertise, and reputation, and not on a rising market. He neither anticipated nor exercised any control over the investment.[13]

The district court held there was no security *because* the profit was going to come only from a resale and *because*

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[12]Green's brief pp. 11, 10.

[13]Indisputably, a written instrument is not always dispositive of the existence of a security. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943). See also *Grainger v. State Security Life Ins. Co.*, 547 F.2d 303, rehearing denied, 563 F.2d 215 (5th Cir. 1977).

Green was not going to develop the property physically.[14] These restrictions on the definition of a security do not simply apply established law to particular facts. They instead erroneously exempt an important class of investment schemes from the protections afforded by the securities laws.

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[11]As the court announced at trial:

> I ruled earlier in this case after an evidentiary hearing that the primary purpose of plaintiff's purchase of an interest in the Magnolia Ranch property was for resale of the land within a year at an increased price and not for development. The income from the grove and the leases were to be used to offset interest payments, thus my finding was that the anticipated increments in the value of the land was the basis for investment and not an expectation of profits from the income-producing operations of the property itself. As such this scheme was not a Section 21 investment contract as defined by the United States and Florida Supreme Court decisions. Hence, the federal securities laws and the Florida Blue Sky laws are inapplicable to the facts in this case. Accordingly, in light of all of the relevant evidence gathered in this cause and now further confirmed at this trial, I hereby reaffirm my decision to dismiss all claims under the Federal and Florida securities laws.

CONCLUSION

For these reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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